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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 742

STATE OF MARYLAND, ET AL.,
Appellants,

v.

W. WILLARD WIRTZ,
SECRETARY OF LABOR, ET AL.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

APPELLANTS' APPENDIX

In The United States District Court for the District of Maryland

Civil Action No. 18005

State of Maryland, et al.,
Plaintiffs,

v.

W. Willard Wirtz, Secretary of Labor, United States Department of Labor, et al.,
Defendants.

OPINION OF COURT

(Filed June 13, 1967)

Before: Winter, Circuit Judge, Thomsen, Chief Judge, and Northrop, District Judge.

WINTER, Circuit Judge:

This is an action brought by the State of Maryland, in which twenty-five other States have intervened as parties plaintiff, asking the Court to declare unconstitutional the 1966 Amendments to the Fair Labor Standards Act[1] (the "1966 Amendments") insofar as they apply to employees of the plaintiff States, and to enjoin enforcement of the Act, as amended, against the States. Although the 1966 Amendments extend the Act's coverage to employees of enterprises, whether public or private, engaged in the operation of schools, hospitals and related institutions, street, suburban or interurban electric railways, and local trolley and motorbus carriers, the States, in briefs and

[1] Public Law, 89-601, 80 Stat. 830, amending the Fair Labor Standards Act of 1938, 29 U.S.C.A. §§201, *et seq.*

oral argument, challenge application of the Act only to public schools, hospitals and related institutions; and this Court will limit its consideration accordingly.

Defendants have filed a motion to dismiss or, in the alternative, a motion for summary judgment. Plaintiffs have filed cross-motions for summary judgment. The parties have entered into extensive stipulations of fact with regard to Maryland, Texas and Ohio. It is agreed that these data may be taken as representative of the situation in the other plaintiff States. Some objections to relevancy and materiality have been raised, but the Court is satisfied that the conclusions reached herein would not be affected by the exclusion of any of the stipulation evidence.

Introduction

The Fair Labor Standards Act, 29 U.S.C.A. §§ 201, *et seq.*, was first enacted in 1938 as a result of Congressional findings, recited in § 2(a) of the Act, 29 U.S.C.A. § 202, that:

> "the existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standards of living necessary for health, efficiency, and general well-being of workers (1) causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several States; (2) burdens commerce and the free flow of goods in commerce; (3) constitutes an unfair method of competition in commerce; (4) leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce; and (5) interferes with the orderly and fair marketing of goods in commerce."

It was therefore declared to be the policy of Congress, through the exercise of its power to regulate commerce among the several states "to correct and as rapidly as practicable to eliminate the conditions above referred to in such industries without substantially curtailing employments or earning power." 29 U.S.C.A. § 202(b). Congress

accordingly provided that employers must pay those employees who were "engaged in commerce or in the production of goods for commerce" a minimum hourly wage, 29 U.S.C.A. § 206(a), and one and one-half times their regular hourly rate for weekly hours over a specified maximum, 29 U.S.C.A. § 207(a)(1). States and their political subdivisions were excluded from the Act's definition of "Employer." 29 U.S.C.A. § 203(d).

The constitutionality of the original Act was sustained in *United States v. Darby*, 312 U.S. 100 (1941). The Court stated, *inter alia*, that the power of Congress over commerce "extends to those activities intrastate which so affect interstate commerce or the exercise of the power of Congress over it as to make regulation of them appropriate means to the attainment of a legitimate end, the exercise of the granted power of Congress to regulate interstate commerce." *Id.*, at p. 118.[2]

The Act has been amended several times,[3] but until the 1966 Amendments state employees were not brought within its coverage.

In 1961 the "enterprise" concept was introduced. 29 U.S.C.A. § 203(r), 75 Stat. 65. In addition to employees previously covered — those personally engaged in interstate commerce or in the production of goods for commerce — the Act was extended to cover "the related activities performed (either through unified operation or common

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[2] Subsequent decisions have pointed out that "Congress did not exercise in this Act the full scope of the commerce power," but rather chose "to regulate only part of what it constitutionally can regulate." *Walling v. Jacksonville Paper Co.*, 317 U.S. 564, 570-571 (1943); *Kirschbaum Co. v. Walling*, 316 U.S. 517, 521-522 (1942). See also *Overstreet v. North Shore Corp.*, 318 U.S. 125, 128 (1943); *Higgins v. Carr Bros. Co.*, 317 U.S. 572, 574 (1943); *Mitchell v. H. B. Zachry Co.*, 362 U.S. 310, 313 (1960).

[3] The principal amendatory enactments have been the Portal-to-Portal Act of 1947 (61 Stat. 84), the Fair Labor Standards Amendments of 1949 (63 Stat. 910), the Fair Labor Standards Amendments of 1955 (69 Stat. 711), the Fair Labor Standards Amendments of 1961 (75 Stat. 65), the Equal Pay Act of 1963 (77 Stat. 56), and the Fair Labor Standards Amendments of 1966 (80 Stat. 830).

control) by any person or persons for a common business purpose, and includes all such activities whether performed in one or more establishments or by one or more corporate or other organizational units including departments of an establishment operated through leasing arrangements, but shall not include the related activities performed for such enterprise by an independent contractor." An "enterprise engaged in commerce or in the production of goods for commerce," and therefore covered by the Act, was defined in terms of a minimum annual dollar volume of gross sales and, in some instances, the particular type of business involved. See 29 U.S.C.A. § 203(r) and (s). The validity and scope of the enterprise concept has not yet been decided by the Supreme Court.

The 1966 Amendments extended the enterprise basis of coverage and brought within the Act public as well as private enterprises engaged in operating schools, hospitals and related institutions, street, suburban or interurban electric railways, and local trolley or motorbus carriers.[4] The definition of "employer" in 29 U.S.C.A. § 203(d) was amended to eliminate the existing exclusion of States and their political subdivisions insofar as they engaged in those activities. In fitting employees first covered by the 1966 Amendments into the minimum wage and maximum hour scale of employees theretofore covered, the 1966 Amend-

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[4] In addition to amending the Act's definition of "employer" (see text, *infra*), other pertinent changes effected by the 1966 Amendments were: an existing exemption for hospitals and certain related institutions and schools for handicapped or gifted children, formerly contained in §13(a)(2)(iii), was eliminated, and such institutions and schools, as well as elementary and secondary schools and institutions of higher learning, were designated in §3(s)(4) as types of enterprises whose coverage would not depend on an annual gross volume test; the existing annual gross volume test for local transit enterprises (in former §3(s)(2)) was lowered from $1 million to $500,000 until Feb. 1, 1969 and to $250,000 thereafter (§3(s)(1)); and the definition of "enterprise" in §3(r) was amended to provide that local transit operations, the above described schools and hospitals and related institutions, whether public or private or for profit or not for profit, would be regarded as operated for a "business" purpose.

ments provide for an escalation of the minimum wage and of maximum hours over a period of five years.[5]

The 1966 Amendments, which thus had the effect of extending the minimum wage and overtime provisions of the Fair Labor Standards Act to a *portion* of the labor market not theretofore covered,[6] are attacked insofar as they extend coverage to certain employees of public schools, hospitals and related institutions. Despite the impression sought to be created by several of the plaintiff States, extension of the Act to certain groups of state employees was not a concept first advanced in the Second Session of the 89th Congress under circumstances which would have prevented the States from presenting their views in opposition to the proposal, had they sought to keep abreast of matters under consideration by Congress.

The first legislative effort to extend coverage to some state employees occurred in the First Session of the 89th Congress.[7] During the Second Session of the 89th Congress,

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[5] Thus, while the minimum wage for employees theretofore covered by the Act is $1.40 per hour, for the first year after February 1, 1967, and $1.60 per hour thereafter, minimum wages for employees newly covered are $1.00 per hour, for the first year and increase 15¢ per year for each year thereafter until the level of $1.60 is reached. Similarly, overtime must be paid to employees theretofore covered who work in excess of 40 hours per week, while overtime must be paid to newly covered employees who work more than 44 hours, the first year, 42 hours, the second year, and 40 hours each year thereafter, respectively, after February 1, 1967.

[6] While the 1966 Amendments to the Fair Labor Standards Act, *inter alia*, extend the Act's coverage to employees of schools, hospitals and related institutions, electric railways, trolley and motorbus systems, *whether public or private*, not every employee of such enterprise is made subject to the Act. Section 13 of the Act, 29 U.S.C.A. §213, as it existed prior to the effective date of the 1966 Amendments, and as amended by the 1966 Amendments, exempts certain classes of employees. For our purposes, the significant exemption is that of a person "employed in a bona fide executive, administrative or professional capacity (including any employee employed in the capacity of academic, administrative personnel or teacher in elementary or secondary school * * *)."

[7] During the 89th Congress, 1st Session, H. R. 8259, was introduced in response to a special message of President Johnson urging,

when H. R. 13712, which, as amended, was enacted as the 1966 Amendments, was introduced into the House of Representatives, it contained language which would have extended coverage (subject to the exemptions in § 13)[8] to any person "in connection with the operation of a hospital, an institution primarily engaged in the care of the sick, the aged, the mentally ill or defective who reside on the premises of such institution, a school for mentally handicapped or gifted children, or an institution of higher education (*regardless of whether or not such hospital, institution or school is public or private or operated for profit or not for profit*) * * *."[9] (Emphasis supplied.) During legislative consideration of the bill, the only variation as to the extent of coverage, pertinent to this law suit, was whether public or private school employees covered should be limited to those employed by "an institution of higher education" or whether they should include persons employed by "an elementary or secondary school."[10] The

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inter alia, extension of the Fair Labor Standards Act to an additional 4½ million workers. H. R. 8260 introduced by Mr. Roosevelt, also would have extended coverage of the Act. Neither bill purported to be applicable to state employees. While hearings on both bills were being conducted by the House Committee on Education and Labor, to which they had been referred, Mr. Roosevelt introduced another bill, H. R. 10518. This new bill extended coverage to certain employees of public and private hospitals and institutions of higher education regardless of whether public or private, profit or non-profit.

H. R. 10518 was referred to the Committee on Education and Labor which, on August 25, 1965, reported the bill favorably, without amendment, and recommended that it be passed. House Rpt. No. 871, 89th Cong., 1st Sess. H. R. 10518 was then committed to the Committee of the Whole House on the State of the Union and no further action was taken thereon. Cong. Quart. Almanac, 1965, Vol. 21, p. 861.

[8] See, n. 6, *supra*.

[9] The bill as originally introduced would have also extended coverage to employees of a "street, suburban or interurban electric railway, or local trolley or motorbus carrier, if the rates and services of such railway or carrier are subject to regulation by a State or local agency (*regardless of whether or not such railway or carrier is public or private or operated for profit or not for profit*) * * *." (Emphasis supplied.)

[10] As introduced, the bill did not apply to employees of elementary and secondary schools, although it did apply to employees of insti-

question was resolved by extending coverage to employees of elementary and secondary schools, as well as institutions of higher learning, subject, again, to the exemptions contained in § 13 of the Act, as also amended by the 1966 Amendments.

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tutions of higher learning, whether public or private. After the House Education and Labor Committee reported the bill favorably, with amendments, the House resolved itself into the Committee of the Whole House on the State of the Union. At this point in the legislative process, Mr. Collier, of Illinois, offered an amendment to extend coverage to employees of elementary and secondary schools. The amendment was adopted and the bill passed the House as so amended. He made the following statement about the rationale of his amendment, viz.,

"(Mr. Collier) Mr. Chairman, these amendments are simple and sound and essential amendments. I do not believe that any member of this body who believes in the principle and purpose of the bill before us today can oppose them.

"What we have done here, if Members will review with me the language of the definition of 'enterprise,' is to say that in sum and substance the employee who works as a dishwasher in a home for the sick or the aged or mentally ill, or one who works as a dishwasher in a college or university cafeteria, or one who works as a dishwasher, for example, in a mental institution, is covered under this bill. Yet, the same employee working as a dishwasher in an elementary or high school cafeteria is not covered.

"*All I want to do is to establish equity in application of the bill.* Let me tell why. I believe I can best explain it by giving an example. This is an actual case.

"In a suburban area of one of our suburban States, school officials were recently notified that poverty funds were available to hire students who qualified under the poverty family income level at $1.25 per hour. What happened was this: The same school had working in the cafeteria women who had been employed for years — in fact, one was a widow — drawing 85 cents an hour for working in the school cafeteria. Yet, children were handpicked and given $1.25 an hour to wash blackboards in the same school.

"I do not believe there is anyone sitting in this House today who can justify this type of situation realizing, as we all must, that there will be under the poverty program a $1.25 hourly wage level. If not, then I would have grave reservation as to the depth of the sincerity such a Member would have in the principle of minimum wage.

"(Mr. Pucinski) Mr. Chairman, will the gentleman yield?

"(Mr. Collier) I yield to the gentleman from Illinois.

"(Mr. Pucinski) Mr. Chairman, if I understand this amendment correctly, it will establish a different fair labor standard provision

The plaintiff States attack the constitutionality of the 1966 Amendments on the ground that the activities of the States and various school districts in the operation of schools, hospitals and related institutions are not commerce,[11] that the "enterprise" concept embodied in the Act by amendments adopted in 1961 is unconstitutional, and that the 1966 Amendments unconstitutionally impugn state sovereignty.[12]

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for people presently employed in elementary and secondary schools and universities.

"(Mr. Collier) That is exactly correct. *I do not want any inequities such as we have been talking about today. We are moving to achieve equity which means treating everyone alike.*" (Emphasis supplied.) 112 Congressional Record (May 25, 1966), pp. 10820-10821.

The Senate Committee on Labor and Public Welfare reported the bill favorably, with an amendment to *exclude* employees of elementary and secondary schools, and this amendment was adopted. Senate Report No. 1487, August 23, 1966, 2 U.S.C. Congressional and Administrative News (89th Congress — Second Session, 1966), p. 3002. The Senate Committee, however, did not undertake to exclude any other public employees from coverage under the Act. The excluded coverage was subsequently restored by the Conference Committee appointed to iron out differences between the House and Senate versions of the legislation. Conference Report No. 2004, September 6, 1966, 2 U.S.C. Congressional and Administrative News, *supra*, p. 3047. It was with an extension of coverage to employees of elementary and secondary schools that H. R. 13712 was finally enacted and signed into law.

[11] Texas words this point as follows: "A state in the performance of the functions of its sovereignty is not engaged in commerce within the meaning of the commerce clause of the constitution of the United States."

[12] Maryland also advances an argument based upon the Eleventh Amendment and its asserted conflict with the provision of the Fair Labor Standards Act which permits an employee not paid in accordance with the minimum wage or overtime provisions of the Act to bring suit if such suit is not brought by the Secretary. 29 U.S.C.A. §216. This argument is beyond the scope of this consolidated proceeding and will not be further considered at this time. It may be made if and when the basic validity of the 1966 Amendments is established and some State employee attempts to sue his employer. Of course, when the argument is advanced and if it is found valid, due regard will be given to the other enforcement provisions con-

I conclude, for the reasons hereafter stated, that all three of these contentions should be resolved against the plaintiffs, that to the extent of the scope of this proceeding the 1966 Amendments should be declared valid and constitutional, and that injunctive relief should be denied.

Commerce Power

Maryland and Texas argue that the activities of a State do not constitute "commerce" which may be regulated under the exclusive power vested in Congress to regulate interstate and foreign commerce. Maryland argues more specifically that, with respect to the operation of public schools, the State's activity has three attributes which remove it from any legitimate definition of commerce, i. e., the activity is non-profit, it is purely governmental, and there is no non-governmental system to compete with or substitute for it.

At the outset, it is well to note that these arguments are based upon a more restrictive premise than the decided cases will support. *United States v. Darby, supra,* upholding the constitutionality of the Fair Labor Standards Act generally, is only one of many decisions which holds that the power of Congress over interstate commerce includes not only that which in itself is interstate commerce but also "extends to those activities intrastate which so affect interstate commerce or the exercise of the power of Congress over it, as to make the regulation of them appropriate

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tained in 29 U.S.C.A. §216 and the separability language in 29 U.S.C.A. §219.

Maryland and Texas also argue that their schools and hospitals are the "ultimate consumers" of commodities purchased from out-of-state, that such commodities are not "goods" as defined by 29 U.S.C.A. §203(i) and, as a consequence, the Fair Labor Standards Act is not applicable to them. This argument is one of statutory construction, not of constitutional significance, and is also one beyond the scope of this proceeding. It should be asserted in a suit in which the application of the Act to a particular school or hospital is brought into question, so that after full development of the facts, it may be determined if that particular enterprise meets the statutory tests for coverage.

means to the attainment of a legitimate end." *Id.*, at p. 118. See also, *United States v. Wrightwood Dairy Co.*, 315 U.S. 110, 119 (1942); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 258 (1964); *Katzenbach v. McClung*, 379 U.S. 294, 300-301 (1964). Among the decided cases, the most extreme example of the reach of the commerce power of Congress to regulate local activity is *Wickard v. Filburn*, 317 U.S. 11 (1942), where a farmer's consumption of wheat raised on his own farm was held within the reach of Congress to regulate under the commerce clause because that consumption, and its counterpart on other farms, exerted a substantial economic effect on interstate commerce.

Thus, the proper inquiry is not limited to a consideration of whether the activities of the States in operating public schools, schools of higher education or hospitals, are "commerce" as such. The proper inquiry is much broader. It is whether such activities are commerce or affect commerce, even though local in nature, and hence within the power of Congress to regulate commerce.

Maryland's claims that public schools are non-profit, purely governmental and not in direct competition with non-governmental systems are not shibboleths to determine what is and what is not commerce. "Commerce" is not confined to "business" activity in a conventional sense; it includes non-business and non-profit activities, whether private or governmental in nature and irrespective of whether they compete with or may be substituted for by private enterprise. *Powell v. U. S. Cartridge Co.*, 339 U.S. 497 (1950); *Mitchell v. Lublin, McGaughy & Asso.*, 358 U.S. 207 (1959); *United States v. Ohio*, 385 U.S. 9 (1966); *Wirtz v. R. E. Lee Electric Company*, 339 F. 2d 686 (4 Cir. 1964); *Mitchell v. Owen*, 292 F. 2d 71 (6 Cir. 1961); *Goldberg v. Nolla, Galib & Cia*, 291 F. 2d 371 (1 Cir. 1961), *cert. den.*, 368 U.S. 900 (1961); *N.L.R.B. v. Central Disp. & E. Hosp.*, 145 F. 2d 852 (D.C. Cir. 1945), *cert. den.*, 324 U.S. 847 (1945).[13] In *Public Building Authority of Birmingham v.*

[13] Pertinent also are the following authorities which have held to be "commerce," *non-commercial* interstate transportation of persons and chattels; *Edwards v. California*, 314 U.S. 160 (1941)

Goldberg, 298 F. 2d 367, 370 (5 Cir. 1962), the Court, in holding that federal employees engaged in processing claims for the payment of social security benefits and preparing government checks for beneficiaries were producing goods for commerce, summarized prior holdings by declaring that "there need be no private parties or profit motive present to constitute commerce." It will be noted that this was said in a case in which all of the factors urged by Maryland to render her activities not within the commerce power of Congress were present: the activity was governmental, non-profit, and could not be performed by private enterprise.

The fact is that under the stipulations before us there is abundant evidence that the States, in the performance of the functions where certain employees are covered by the Act, as amended by the 1966 Amendments, are not only engaging in commerce, or in the production of goods for commerce, but are engaging in activities, local in nature, which have a substantial effect on commerce. A brief recital of some of the stipulations between the parties is sufficient to demonstrate.

In the current fiscal year an estimated $38.3 billion will be spent by State and local public educational institutions in the United States. In the fiscal year 1965, these same authorities spent $3.9 billion operating public hospitals. Expenditures of this magnitude are bound to have an enormous impact on interstate commerce.

For Maryland, which was stipulated to be typical of the plaintiff States, 87% of the $8 million spent for supplies

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(movement of indigent persons across state lines); *Thornton v. United States*, 271 U.S. 414 (1926) (diseased cattle ranging across state lines); *Caminetti v. United States*, 242 U.S. 470 (1917) (transportation of women across state lines for non-commercial immoral purposes); *Brooks v. United States*, 267 U.S. 432 (1925) (transportation of stolen articles); *United States v. Hill*, 248 U.S. 420 (1919) (transportation of liquor for one's own consumption). As a latest expression of the state of the law, *Heart of Atlanta Motel, Inc. v. United States, supra*, at pp. 256-257, declares: "Nor does it make any difference whether the transportation is commercial in character."

and equipment by its public school system during the fiscal year 1965 represented direct interstate purchases. Over 55% of the $576,000 spent for drugs, x-ray supplies and equipment and hospital beds by the University of Maryland Hospital and seven other state hospitals were out-of-state purchases. With respect to seven other state hospitals which spent $875,000 on such items during the comparable period, the parties have stipulated that all or "the most part" of such items were manufactured outside of Maryland.

In Ohio, also stipulated to be typical of all of the plaintiff States, there are 708 school districts, 3 of which (stipulated to be typical of the other school districts) purchased a total of $323,000 in supplies in the fiscal year 1966. Approximately 50% of these purchases were directly from outside of the state. Ohio's six state universities spent $9 million on certain specified supplies in that year, over 42% of which were purchased directly from out-of-state, with an undetermined portion of the remainder being manufactured outside the state.

In Texas, all text books originate outside the state, and it is stipulated that "the major portion" of drugs and hospital equipment is either purchased directly from out of the state or is at least manufactured in other states.

The interstate flow of school and hospital supplies and equipment is, in large part, inevitable because of the non-diffusion of manufacturing supplies. For example, there are no Maryland suppliers for fourteen out of eighteen major categories of school supplies and equipment. Even larger States, such as Ohio and Texas, have no producers, or very few producers, of text books, science equipment and physical education equipment.

Not only do public schools and hospitals give rise to a large interstate flow of supplies and equipment, having a correspondingly substantial effect upon interstate commerce, public schools and hospitals are directly engaged in commerce and the production of goods for commerce by virtue of federal aid to education and health, involving billions of dollars. Over $4 billion is spent each year in federal grants, of which over $2 billion goes for elementary

and secondary public education, 50% of which is granted directly to local school districts under programs requiring extensive communications between local schools and regional and national facilities of the United States Office of Education. In the area of health services, federal expenditures during fiscal year 1965 amounted to $5 billion, while State and local government expenditures amounted to $4.9 billion. Included in the total of federal expenditures, are annual federal assistance of $260 million for the construction and enlargement of hospitals and other health facilities, annual medical research grants of over $600 million, and public health grants of $65 million to support State and local health agencies, both in operating costs and in programs for the control of disease. Additionally, the Social Security Administration during fiscal 1967 will pay out $2.35 billion for hospital services under the Medicare program, in which 94% of the hospitals in the country, both public and private, currently participate. Another 1 billion will be spent for direct reimbursement to hospitals and physicians for services to eligible patients. These programs create a regular interstate flow of funds to participating hospitals, extensive interstate communication and preparation of materials for interstate transmission by both local hospitals and state agencies, including engineering and architectual plans for hospital construction and enlargement, research data and reports, medical benefits claims, and numerous other types of reports and records.

"Ideas, wishes, orders and intelligence" are "subjects of commerce," *Western Union v. Lenroot*, 323 U.S. 490, 502-503 (1945), and the preparation of written documents and other materials for out-of-state transmission, as well as the actual interstate transmission of funds, documents and other communications, are all activities in commerce. *Beneficial Finance Co. v. Wirtz*, 346 F. 2d 340 (7 Cir. 1965); *Willmark Service System, Inc. v. Wirtz*, 317 F. 2d 486 (8 Cir. 1963), *cert. den.*, 375 U.S. 897 (1963); *Public Building Authority of Birmingham v. Goldberg*, 298 F. 2d 307 (5 Cir. 1962); *Mitchell v. Kroger Company*, 248 F. 2d 935 (8 Cir. 1957); *Aetna Finance Co. v. Mitchell*, 247 F. 2d 190 (1 Cir. 1957). Thus, from these activities, as well as the

out-of-state purchases and the receipt of interstate shipments which are either stipulated or inescapably must be inferred from the facts stated, the conclusion is inevitable that the activities of the states are "*in*" commerce, constitute the production of goods for commerce, or substantially affect commerce, although local in nature. Leaving aside for the moment the question of state sovereignty, I conclude that these activities are clearly within the power of Congress to regulate commerce.

The Enterprise Concept

The only authorities to pass on the constitutionality of the enterprise concept, *Wirtz v. Edisto Farms Dairy*, 242 F.S. 1 (D. S.C. 1965), and *Goldberg v. Ed's Shopworth Supermarket*, 214 F.S. 781 (W.D. La. 1963), have both sustained its validity. From my examination of the pertinent authorities, I am in accord with the result reached in those decisions and conclude that the enterprise concept embodied in the Fair Labor Standards Act in 1961, 29 U.S.C.A. § 203(r), represents a constitutionally valid exercise of the power of Congress to regulate commerce.

As I have recited, prior to 1961 the Fair Labor Standards Act applied only to those employees who themselves engaged in commerce or in the production of goods for commerce. By the provisions of the 1961 Amendments, *all* employees of various enterprises whose activities related to the movement of goods in commerce, including those engaged in selling, distributing or using goods that had previously moved in commerce became subject to the Act, subject, of course, to the exemptions contained in § 13 of the Act, 29 U.S.C.A. § 213.[14]

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[14] The 1961 extension of the Act's coverage had the effect of adding over four million workers to the twenty-four million previously within the Act's protection. This extension of coverage was the result of deliberate and lengthy consideration by at least two Congresses. (Senate Report No. 145, 87th Congress, First Session, pp. 2, 10; House Report No. 75, 87th Congress, First Session, pp. 2, 7). Exercise of the power to extend coverage was based upon the conclusion discussed in detail in the Committee Reports of both the Senate and the House, that the additional coverage was necessary

Translated into a concrete example, the enterprise concept, as amended by the 1966 Amendments, means that in a private or public hospital the nurse's aid or maintenance worker, even though not engaged in commerce or in the production of goods for commerce, is subject to the minimum wage and overtime provisions of the Act if some employee of the hospital is engaged in commerce or in the production of goods for commerce, or handling goods in commerce. That Congress may constitutionally so extend coverage seems clear from the decided cases, of which Congress was fully aware when it first adopted the enterprise concept in 1961.[15] Indeed, it may properly be concluded that in adopting the enterprise concept Congress did not exercise to the limit its full power to regulate commerce, because application of the enterprise concept is conditioned upon the presence of some employee directly engaging in commerce, producing goods for commerce or handling goods in commerce. From the authorities it may be concluded that the enterprise concept could have been conditioned upon some employee engaging in local activity "affecting commerce" short of the actual interstate activity previously mentioned.[16]

One of the leading authorities pointing to the conclusions just stated is *Labor Board v. Reliance Fuel Corp.*, 371 U.S. 224 (1963), in which the National Labor Relations Board's jurisdiction over unfair labor practices committed by a retail distributor of fuel oil, all of whose sales were local where the retailer obtained the oil from a wholesaler who imported it from another state, was upheld. The conclusion resulted from the Court's construction of the

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to accomplish the Act's original purposes and was within the scope of the federal commerce power as evidenced by existing precedents under the National Labor Relations Act and other regulatory statutes.

[15] See e.g., Senate Report No. 145, April 10, 1961, 87th Congress First Session, 2 U.S. Code and Adm. News (87th Cong., 1st Sess., 1961), pp. 1622-1623.

[16] In this regard, the authorities cited in footnote 2, *supra*, all of which were decided prior to the 1961 Amendments are pertinent. They clearly indicate that prior to 1961, there were interstices in the Act which Congress could constitutionally fill. As pointed out in the text, they were only partially filed in 1961.

National Labor Relations Act to vest in the Board "* * * the fullest *jurisdictional* breadth constitutionally permissible under the Commerce Clause" (*Id.*, at p. 226), and the citation of *Wickard v. Filburn, supra,* to support the conclusion that the distributor's activities affected commerce and were within the constitutional reach of Congress to regulate. Reference was also made to *Polish Nat. Alliance v. N.L.R.B.*, 322 U.S. 643 (1944), for the proposition that in enacting the National Labor Relations Act "* * * Congress had explicitly regulated not merely transactions or goods in interstate commerce, but activities which in isolation might be deemed to be merely local but in the interlacings of business across state lines adversely affect such commerce." *Id.*, at p. 648.

Similarly, in *N.L.R.B. v. Denver Bldg. & Constr. Trades Council*, 341 U.S. 675 (1951); *Bldg. Trades Council v. Kinard Const. Co.*, 346 U.S. 993 (1954); and *Plumbers Union v. Door County*, 359 U.S. 354 (1959), the use of materials from out-of-state provided the basis for National Labor Relations Board jurisdiction with respect to the construction, respectively, of an office building, a court house and a housing project. See also, *San Diego Unions v. Garmon*, 353 U.S. 26 (1957); *Meat Cutters v. Fairlawn Meats*, 353 U.S. 20 (1957). See also, *Howell Chevrolet Co. v. N.L.R.B.*, 346 U.S. 482 (1953).

If the National Labor Relations Board may regulate the acts of the employer toward each employee of the fuel oil retail distributor and every construction worker on a building project without regard to whether that employee is directly engaged in interstate commerce simply because some goods are bought by the company out-of-state, it cannot be doubted that the nurse's aid or hospital maintenance worker likewise may be brought under the coverage of the Fair Labor Standards Act when someone employed by the hospital purchases drugs and equipment out-of-state, or purchases from local sources drugs and equipment which were produced out-of-state, or handles drugs and equipment originating from out-of-state, or the hospital engages in commerce in administering and carrying out a federal health grant or the program of Medicare, even

through the nurse's aid or maintenance worker himself does not carry on such activities. The same is true in regard to employees of schools, elementary, secondary, or institutions of higher learning, and specialized hospitals engaged in treatment of the mentally ill, those suffering from contagious diseases, the aged, or the handicapped.

It is a matter of elementary logic that the hospital and the school function as a result of the sum of all of the activities of all of their employees. The hospital administrator or the superintendent of education (himself exempt from the provisions of the Act), or his secretary, or some other employees, would have no occasion to engage in commerce, or the production of goods in commerce, if the services of the employees covered by the Act under the 1966 Amendments were permanently withdrawn. Their services are essential to the operation of the hospital or the school and, hence, their activities, although local in nature, substantially affect commerce, so that Congress may regulate the minimum wages to be paid them as well as the maximum hours they may be required to work without payment of overtime.

STATE SOVEREIGNTY

The precise claim of unconstitutional interference with state sovereignty made in this case has not been adjudicated by any court, because Congress has not heretofore attempted to regulate minimum wages and maximum hours (without overtime) for state employees. But from what has been decided in numerous other contexts analogous to the case at bar, and from the basis of those decisions, I can only conclude that the 1966 Amendments are valid and constitutional in their entirety. I have already referred to the cases in which the full extent of the power of Congress generally to regulate commerce has been developed. In every instance in which the exercise of this power has been applied to some state activity, the validity of the exercise has been upheld in language and on reasoning which, I am satisfied, sustains the validity of the 1966 Amendments. Because it on this aspect of the case that the States most vigorously attack the

validity of the 1966 Amendments, I am constrained to discuss these authorities fully.

Since the States are most vociferious in conjuring up the possible "horribles" of an adverse adjudication to them,[17] it is necessary, at the outset, to define what is — and what is not — presently before us. Before me is only the question of whether Congress may prescribe minimum wages and overtime for non-executive, non-professional and non-administrative employees of private and public hospitals, schools and related institutions. Congress has singled out this group which, experience has proved, is often underpaid and subjected to unreasonable work schedules and has required that its members be paid a minimum sum which, measured by the standards of contemporary society, is deemed a decent wage and that they not be compelled to work longer hours in a work period without payment of overtime than, by those standards, are deemed proper. These standards have been made applicable to private and public employees, alike. Congress has *not* sought to cover doctors, nurses, principals, teachers, research assistants, or the like. Nor has Congress sought to cover the governors, attorneys general, legislators, judges or policemen, who, some of the States assert, could eventually be covered if we upheld the validity of the 1966 Amendments.

Our consideration of the constitutional issue presented here cannot deal with hypothetical projections by the States of regulations yet to come. Our consideration of the States' contention that their sovereignty is impaired, and my conclusion that the 1966 Amendments are valid and constitutional, are limited to the 1966 Amendments and only those employees to which they extend, as are my previous conclusions that the power to regulate under the commerce clause exists and that the enterprise concept is constitutional. No court, and in particular no lower federal court, should attempt to adjudicate that which is not justiciable; all must steadfastly follow the rules set down by the Supreme Court governing the process of constitutional adjudication:

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[17] See *New York v. United States*, 326 U.S. 572, 583-584 (1946).

"The very foundation of the power of the federal courts to declare Acts of Congress unconstitutional lies in the power and duty of those courts to decide cases and controversies properly before them. This was made patent in the first case here exercising that power — 'the gravest and most delicate duty that this Court is called on to perform.' Marbury v. Madison (US) 1 Cranch 137, 177-180, 2 L. ed. 60, 73, 74. *This Court, as is the case with all federal courts, has no jurisdiction to pronounce any statute, either of a State or of the United States, void, because irreconcilable with the Constitution, except as it is called upon to adjudge the legal rights of litigants in actual controversies.* In the exercise of that jurisdiction, it is bound by two rules, to which it has rigidly adhered, one, never to anticipate a question of constitutional law in advance of the necessity of deciding it; the other never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.' * * * Kindred to these rules is the rule that one to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional. * * * In Barrows v. Jackson, 346 U.S. 249, 97 L. ed. 1586, 73 S. Ct. 1031, this Court developed various reasons for this rule. Very significant is the incontrovertible proposition that it 'would indeed be undesirable for this Court to consider every conceivable situation which might possibly arise in the application of complex and comprehensive legislation.' Id. 346 U.S. at 256. *The delicate power of pronouncing an Act of Congress unconstitutional is not to be exercised with reference to hypothetical cases thus imagined.* (emphasis supplied; footnote eliminated) *United States v. Raines*, 362 U.S. 17, 20-22 (1960).[18]

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[18] Although one of the best expressions of judicial self-restraint in the process of constitutional adjudication, *United States v. Raines*, *supra*, does not stand alone. It is only one of a line of decisions

As a first step in the decision of the limited question before me, it is necessary to put to rest any argument based upon the Tenth Amendment, as such. The Tenth Amendment is but a "truism" — "that all is retained which has not been surrendered." *United States v. Darby, supra,* at p. 124. Besides stating this self-executing formula, the decided cases are clear that the Tenth Amendment neither adds to nor detracts from the essential question to be decided in this case. *United States v. Sprague,* 282 U.S. 716, 733-734 (1931); *United States v. Appalachian Electric Power Company,* 311 U.S. 377, 428 (1940); *Oklahoma ex rel Phillips v. Guy F. Atkinson Co.,* 313 U.S. 508, 534 (1941); *Fernandez v. Wiener,* 326 U.S. 340, 362 (1945); *Case v. Bowles,* 327 U.S. 92, 101-103 (1946); *United States v. Oregon,* 366 U.S. 643, 649 (1961).

I turn directly to the cases where federal regulation under the Commerce Clause has been upheld, even when applied to an "essential" state activity. The principal authorities which must be considered are *Samitary District v. United States,* 266 U.S. 405 (1925); *Board of Trustees v. United States,* 289 U.S. 48 (1933); *Case v. Bowles,* 327 U.S. 92 (1946); and the four related cases of *United States v. California,* 297 U.S. 175 (1936); *California v. United States,* 320 U.S. 577 (1944); *California v. Taylor,* 353 U.S. 553 (1957); and *Parden v. Terminal R. of Alabama Docks Dept.,* 377 U.S. 184 (1964). Also of interest, because it posed an issue of state sovereignty dispositive of this litigation, is *United States v. Ohio,* 385 U.S. 9 (1966).

The oldest and one of the most important cases is the *Sanitary District* case. This was a suit by the Attorney

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developing the concept which it so eloquently states: *Flint v. Stone Tracy Co.,* 220 U.S. 107 (1911); *Village of Euclid v. Ambler Realty Co.,* 272 U.S. 365 (1926); *Ashwander v. Tennessee Valley Authority,* 297 U.S. 288, 347 (1936) (concurring opinion, Brandeis, J.); *Alabama State Federation of Labor v. McAdory,* 325 U.S. 450 (1945); *United Public Workers v. Mitchell,* 330 U.S. 75 (1947); *United States v. Spector,* 343 U.S. 169 (1952); *International L. & W. Union v. Boyd,* 347 U.S. 222 (1954). Additional authorities are cited in the portion of the opinion in *United States v. Raines, supra,* from which the quotation is extracted.

General of the United States to enjoin the Sanitary District of Chicago from diverting a volume of water from Lake Michigan in excess of that allowed by federal statute, although a state statute set a higher limit. The federal government asserted the taking to conflict with the power of Congress to regulate interstate and foreign commerce, and with a treaty with Great Britain concerning boundary waters of the Dominion of Canada; the Sanitary District defended on the grounds, *inter alia*, that public health required the taking of the additional quantity of water in accordance with the state statute, because otherwise it would be impossible to carry the city's sewage downstream.

Mr. Justice Holmes, speaking for a unanimous Court, held that the injunction should issue. He declared, basing the right to relief on the power of the federal government to regulate interstate and foreign commerce:

> "The main ground is the authority of the United States to remove obstructions to interstate and foreign commerce. *There is no question that this power is superior to that of the states to provide for the welfare or necessities of their inhabitants.* In matters where the states may act, the action of Congress overrides what they have done." (Emphasis supplied.) *Id.*, at p. 426.

Following this he recited the evidence in detail, including that which clearly showed the sanitary needs of Chicago for the additional water, and concluded the opinion by stating:

> "* * * a large part of the evidence is irrelevant and immaterial to the issues that we have to decide. Probably the dangers to which the city of Chicago will be subjected if the decree is carried out are exaggerated; but, *in any event, we are not at liberty to consider them here as against the edict of a paramount power.*" (Emphasis supplied.) *Id.*, at p. 432.

Maryland argues that Chicago did not need the water for an "essential state function," but I conclude it difficult

to think of something more essentially sovereign or necessary to the welfare of the State and its people than sewage disposal; sewage disposal is as much a part of public health as hospitals for contagious diseases, and hospitals for the mentally ill. Yet, the Court stated in this context that when Congress exercised its power over interstate and foreign commerce, the welfare or needs of the inhabitants of the State *could not even be considered.* Maryland also argues that the case is distinguishable because it concerned a direct burden on commerce. The answer is that Congress has found that substandard wages and non-payment of overtime are also burdens on commerce and this finding has been judicially approved. *United States v. Darby, supra.*

Board of Trustees v. United States, supra, was a case in which the alleged conflict between the exercise of the power of Congress to regulate commerce and the concept of state sovereignty arose where the State was exercising its sovereignty to provide higher education. The University of Illinois imported scientific apparatus for use in one of its educational departments, and it sued to obtain a refund of duties exacted on the importations. For a unanimous Court, Chief Justice Hughes held that the power of the federal government over goods moving in foreign commerce is plenary, that the State in the preformance of state functions might not limit the exercise by Congress of its power, and that the duties were properly laid.

In arriving at this result, the Court recognized that the federal government has the power to tax, including the power to lay duties, and that it has the power to regulate commerce. The existence of the taxing power was stated not to foreclose Congress from laying duties in the exercise of its power to regulate commerce, and the Court concluded that the duties in question were laid in the exercise of the power to regulate commerce and not in the exercise of the taxing power. Having reached that conclusion, the Court then dealt with the argument that in the exercise of the commerce power, Congress was limited by notions of state sovereignty as it was when it exercised its taxing power:

"The principle invoked by the petitioner, of the immunity of state instrumentalities from Federal Taxation, has its inherent limitations. * * * It is a principle implied from the necessity of maintaining our dual system of government. * * * Springing from that necessity it does not extend beyond it. Protecting the functions of government in its proper province, the implication ceases when the boundary of that province is reached. The fact that the State in the performance of state functions may use imported articles does not mean that the importation is a function of the state government independent of federal power. The control of importation does not rest with the State but with the Congress. *In international relations and with respect to foreign intercourse and trade the people of the United States act through a single government with unified and adequate national power. There is thus no violation of the principle which petitioner invokes, for there is no encroachment on the power of the State as none exists with respect to the subject over which the Federal power has been exerted.* To permit the States and their instrumentalities to import commodities for their own use, regardless of the requirements imposed by the Congress, would undermine, if not destroy, the single control which it was one of the dominant purposes of the Constitution to create. *It is for the Congress to decide to what extent, if at all, the States and their instrumentalities shall be relieved of the payment of duties on imported articles.*" (Emphasis supplied.) *Id.*, at p. 59.

Significant also for the case at bar, is the earlier statement of the Court in which it described the power of Congress over interstate and foreign commerce:

"It is an essential attribute of the power that it is exclusive and plenary. As an exclusive power, its exercise may not be limited, qualified or impeded to any extent by state action. * * *.

"* * * *The principle of duality in our system of government does not touch the authority of the Congress in*

the regulation of foreign commerce." (Emphasis supplied.) *Id.*, at pp. 56-57.

Maryland seeks to escape the language in this opinion by the apparent argument that the case involved Congress' power over foreign commerce and the express argument that the power of Congress over commerce would not be limited if recognition were given to state sovereignty over public schools and hospitals. Of course, the Court was writing in the field of foreign commerce, but the power of Congress over foreign commerce is no more plenary and no more exclusive than its power over commerce between the states, the latter including the power to regulate local activities which have a substantial effect on interstate commerce. *Wickard v. Filburn, supra.* The States lack any power to regulate commerce as such; it follows that there can be no interference with state sovereignty over interstate commerce because none exists. Where Congress had extended the Act to certain employees of public schools and hospitals, to hold that Congress may not validly do so necessarily limits the power of Congress. The opinion's specific and peremptory rejection of the assertion that "state functions" can isolate a state or its instrumentalities from federal regulation surely goes a long way to support the validity of the 1966 Amendments. The specific and peremptory rejection of the argument that the principle of duality in our system of government may limit in any way the authority of Congress to regulate commerce is dispositive of the present case.

Case of Bowles, supra, only repeats the clear implications of the *Sanitary District* and *Board of Trustees* cases. In *Case,* a suit for injunction was brought to restrain the State of Washington from selling timber on school lands at prices in excess of those fixed by regulation adopted under the Emergency Price Control Act. The State alleged, in defense of the action, that price controls could not be applied to it because the sale was "for the purpose of gaining revenue to carry out an essential governmental function — the education of its citizens." *Id.*, at p. 101.

This argument was rejected and price controls held applicable to the State in the following language:

"We now turn to petitioner's Constitutional contention. Though as we have pointed out petitioners have alleged that the Act applied to setting a maximum price for school-land timber violates the Fifth and Tenth Amendments, the argument here seems to spring from implications of the Tenth Amendment only. *The contention rest on the premise that there is a 'doctrine implied in the Federal Constitution that the two governments, national and state, are each to exercise its powers so as not to interfere with the free and full exercise of the powers of the other.'* It is not contended, and could not be under our prior decisions, that the ceiling price fixed by the Administrator is Constitutionally invalid as applied to privately owned timber. * * * Nor is it denied that the Administrator could have fixed ceiling prices if the state had engaged in a sales business 'having the incidents of similar enterprises usually prosecuted for private gain.' * * * But it is argued that the Act cannot be applied to this sale because it was 'for the purpose of gaining revenue to carry out an essential governmental function — the education of its citizens.' Since the Emergency Price Control Act has been sustained as a Congressional exercise of the war power, *the petitioner's argument is that the extent of the power as applied to state functions depends on whether these are 'essential' to the state government. The use of the same criterion in measuring the Constitutional power of Congress to tax has proved to be unworkable, and we reject it as a guide in the field here involved.*" (footnote eliminated; emphasis supplied.) *Id.* at p. 101.

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"Where as here, Congress has enacted legislation authorized by its granted powers, and where at the same time, a state has a conflicting law which but for the Congressional Act would be valid, the Constitution marks the course for courts to follow. Article

VI provides that 'The Constitution and the Laws of the United States * * * made in pursuance thereof * * * shall be the supreme Law of the Land * * *.'" (footnote eliminated) *Id.*, at pp. 102-103.

Case v. Bowles, may not be summarily rejected, as it is by Maryland, on the ground that "the real sovereignty of the State was not infringed" and the case arose under the war power of Congress. The power of Congress to regulate commerce is no less plenary and no less exclusive than the power to make war under which the Emergency Price Control Act was adopted. While price limitation on the sale of timber to support public education, in degree, might be less discommoding than fixing wages of certain state employees, the Court's rejection of the "essential" functions argument is of extreme significance; the rejection goes to the very heart of this case.

The line of cases beginning with *United States v. California, supra*, may appear to be distinguishable from the instant case on the ground that each involved state activities which do not fall within the concept of essential governmental functions. Yet the essential nature of the state activity and the sovereignty of the state was interposed as a defense in each of them and rejected by the Court, not on the ground that the activity was not essential but on the ground that the "essential" concept was not a good defense. Thus, the cases are additional authority for concluding that the States' argument here is lacking in merit.

In *United States v. California* the question was whether a terminal railroad owned and operated by a State for the purpose of facilitating the commerce of a port, all of the revenues of which were used to improve port facilities, could be subjected to the Federal Safety Appliance Act, so that the penalty prescribed by that Act for its violation could be recovered from the State of California.[19]

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[19] It is interesting that in an earlier suit, *Sherman v. United States*, 282 U.S. 25 (1930), involving the same belt railroad, Mr. Justice

California urged these activities were not subject to the Act because "* * * it is said that as the state is operating the railroad without profit, for the purpose of facilitating the commerce of the port, and is using the net proceeds of operation for harbor improvement * * * it is engaged in performing a public function in its sovereign capacity and for that reason cannot constitutionally be subjected to the provisions of the federal Act." *Id.*, at p. 183. Mr. Justice Stone (later Chief Justice), speaking for a unanimous Court, specifically rejected this argument and sustained the imposition of the penalty, stating:

> "* * * we think it unimportant to say whether the state conducts its railroad in its 'sovereign' or in its 'private' capacity. That in operating its railway it is acting within a power reserved to the states cannot be doubted. * * * The only question we need consider is whether the exercise of that power, in whatever capacity, must be in subordination to the power to regulate interstate commerce, which has been granted specifically to the national government. The sovereign power of the states is necessarily diminished to the extent of the grants of power to the federal government in the Constitution. * * * In each case the power of the state is subordinate to the constitutional exercise of the granted federal power." *Id.*, at pp. 183-184.

In addition to announcing the absolute supremacy of the power of Congress to exercise its authority to regulate commerce despite the defense of state sovereignty, the Court rejected an argument that the commerce power is circumscribed by state sovereignty, as is the taxing power. It said:

> "The analogy of the constitutional immunity of state instrumentalities from federal taxation, on which respondent relies, is not illuminating. That immunity is

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Holmes said: "California has not gone into business generally as a common carrier, but simply has constructed the Belt Line as an incident of its control of the harbor — a state prerogative." *Id.*, at p. 29.

implied from the nature of our federal system and the relationship within it of state and national governments, and is equally a restriction on taxation by either of the instrumentalities of the other. Its nature requires that it be so construed as to allow to each government reasonable scope for its taxing power * * * which would be unduly curtailed if either by extending its activities could withdraw from the taxing power of the other subjects of taxation traditonally within it. * * * Hence we look to the activities in which the states have traditionally engaged as marking the boundary of the restriction upon the federal taxing power. *But there is no such limitation upon the plenary power to regulate commerce. The state can no more deny the power if its exercise has been authorized by Congress than can an individual.*" (Emphasis supplied.) *Id.*, at pp. 184-185.

In *California v. United States, supra,* an order of the United States Maritime Commission requiring elimination of preferential and unreasonable practices, i.e., excessive free time and non-compensatory charges for services, was held enforceable against the State of California and the Board of State Harbor Commissioners for San Francisco Harbor. California defended its non-compliance with the order on the ground that the Act under which it was issued had no application to public owners or wharves and piers. This question of statutory construction was decided against its contention, with the Court adding:

"* * * it is too late in the day to question the power of Congress under the Commerce Clause to regulate such an essential part of interstate and foreign trade as the activities and instrumentalities which were here authorized to be regulated by the Commission, whether they be the activities and instrumentalities of private persons or of public agencies." *Id.*, at p. 586.

The belt railway which was the subject of litigation in *United States v. California, supra,* was also the subject of litigation in *California v. Taylor, supra.* In the latter the

question was whether the Railway Labor Act was applicable to the *employer-employee relationship* between the State of California and its employees engaged in operating the railroad. Notwithstanding that California provided that its employees had no right to bargain collectively with it concerning terms and conditions of employment, the Railway Labor Act was held applicable on the principle that a state may not prohibit the exercise of rights which the federal labor relations acts protect. As in the earlier cases, California asserted the Act, if held to apply to it, invalidly interfered with its sovereign immunity, but the Court rejected this contention, saying:

> "Finally, the State suggests that Congress has no constitutional power to interfere with the 'sovereign right' of a State to control its employment relationships on a state-owned railroad engaged in interstate commerce. In United States v. California (U.S.) supra, this Court said that the State, although acting in its sovereign capacity in operating this Belt Railroad, necessarily so acted 'in subordination to the power to regulate interstate commerce, which has been granted specifically to the national government.' 297 U.S., at 184. 'California, by engaging in interstate commerce by rail, has subjected itself to the commerce power, and is liable for a violation of the Safety Appliance Act, as are other carriers. . . .' Id. 297 U.S., at 185. That principle is no less applicable here. In California, by engaging in interstate commerce by rail, subjects itself to the commerce power so that Congress can make it conform to federal safety requirements, it also has subjected itself to that power so that Congress can regulate its employment relationships." *Id.*, at p. 568.

A similar result was reached in *Parden v. Terminal R. of Alabama Docks Dept., supra*, where Alabama's plea of sovereign immunity was rejected in a suit brought against it under the Federal Employer's Liability Act by an employee of a railroad which it owned and operated. The decision proceeded on the dual grounds that when Congress was empowered to regulate commerce, the States neces-

sarily lost any portion of their sovereignty that would stand in the way, and that Alabama waived its protection against suit by an individual, as embodied in the Eleventh Amendment, by operating an interstate railroad approximately twenty years after enactment of the Federal Employers' Liability Act.[20]

In *United States v. Ohio, supra,* the question was whether the State of Ohio was liable to the United States for penalties under the Agricultural Adjustment Act of 1938 for growing wheat on state-owned farms in excess of federally-imposed acreage allotments. Specifically, the wheat was grown on a prison farm as part of a program of individual therapy and rehabilitation. It was consumed exclusively on the farm; indeed, by the Ohio Constitution it could neither be "sold, farmed out, contracted or given away." The Sixth Circuit Court of Appeals held that the growing of wheat and consumption of the crop by the inmates of the institution could not have any substantial effect on interstate commerce and, hence, that the Act was inapplicable. 354 F. 2d 549 (1965). The judgment was summarily reversed in a *per curiam* opinion on the authority of *Wickard v. Filburn, supra.*

The *Ohio* case had present all of the factors relied on here by the States to invalidate the 1966 Amendments.

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[20] Three decisions of United States Courts of Appeals in this area are worthy of note. *United States v. Feaster,* 330 F. 2d 671 (5 Cir. 1964), held that the National Mediation Board, acting under the Railway Labor Act, could require the state agency which operated state-owned dock facilities to produce its employment records for inspection by a union. In *State of Colorado v. United States,* 219 F. 2d 474 (10 Cir. 1954), it was held that Colorado State Board of Stock Inspection was subject to the registration requirements of the Packers and Stockyards Act, and to the payment of penalties under the Act, "the same as are private persons or agencies," notwithstanding that inspection was conducted "in its sovereign capacity as a state." *Id.,* at p. 477. The most recent decision in this regard is *N.L.R.B. v. Local 254, Building Service Employees International Union,* ___ F. 2d ___ (1 Cir. 4/10/67), holding that for purposes of the National Labor Relations Act the Department of Education of the State of Massachusetts was "a person engaged in commerce" and "an employer" as defined in the Act.

Nothing could be more essential or a more sovereign governmental function than providing places of detention for those convicted of crimes. The performance of such a state function neither produces income nor competes with any private enterprise. Likewise, it is a function which can in no way be provided by private enterprise. The case was decided by the Court of Appeals on the commerce issue without reaching the asserted issue of impairment of state sovereignty and we are advised that in the briefs presented to the Supreme Court the latter contention was not made. While the case is conclusive authority for determination of the scope of the power of Congress to regulate commerce, it is not necessarily determinative on the issue of impairment of state sovereignty.

In asserting boundaries to federal regulation under the Commerce Clause, the States claim support for the result they advocate in *New York v. United States*, 326 U.S. 572 (1946), and other cases which have held the power of Congress to tax is subject to limitation. It should be noted at the outset that in the *New York* case there was no opinion of the Court, and reliance is placed upon one of the opinions concurred in by only four justices. But the weakness of this authority lies not in the lack of unanimity of the Court, but rather in the fact that other decisions before and after *New York* establish that an unqualified analogy between the taxing power and the commerce power cannot be made. Parenthetically, it should also be noted that in *New York* the claim of state sovereignty was rejected and the validity of the tax upheld. The *Sanitary District* case, *supra*, decided in 1925, and *Board of Trustees v. United States*, decided in 1933, clearly imply that Congress's power to regulate commerce and Congress's power to tax are not coterminus. *Case v. Bowles*, decided the same term as, but after, *New York v. United States*, specifically rejects limitations on the war power such as were suggested on the taxing power by dictum in some of the opinions in the *New York* case. On the other hand, when the power of Congress to regulate commerce is being considered, *United States v. California*, decided ten years before the *New York* case, is specific in saying that the test of validity of

regulation under the Commerce Clause is different from the test of the validity of federal taxation touching upon state sovereignty. See also, *United States v. Kahriger*, 345 U.S. 22 (1953).

These cases demonstrate that the taxing power and the commerce power have been viewed by the Supreme Court as having different limitations, because of the concurrent nature of the former, and the plenary nature of the latter. In sharp contrast, stand the statements of the Court that the power of Congress over war and over commerce, both foreign and interstate, are plenary. Because each is plenary, the war and commerce powers of Congress are necessarily coterminus, and *Hopkins Federal Sav. & L. Assn. v. Cleary*, 296 U.S. 315, 343 (1935), so suggests. Thus, cases decided under any of the plenary powers are precedents for similar situations arising under one of the other plenary powers, while cases decided under the taxing power are weak authority for determining the limits of the exercise of a plenary power. While an attempt is made to distinguish *Case v. Bowles* on the grounds that it concerned the war power, and to distinguish the *Board of Trustees* case on the grounds that it concerned the power to regulate foreign commerce, patently, these powers are plenary, coterminus and indistinguishable from the power to regulate interstate commerce. Indeed, while asserting that the cases are distinguishable, the States fail to cite one case holding that these powers are not equally plenary and coterminus; at the same time, the States fail to cite one case holding that the commerce power is restricted to the same area as the taxing power.

Hopkins Federal Sav. & L. Assn. v. Cleary, 296 U.S. 315 (1935), urged on the Court by the States, should also be noticed. In the *Hopkins* case, a federal statute which permitted state building and loan associations to become federal building and loan associations without state consent was held invalid. The Congressional power under which the statute had been adopted was deemed by the Court to be concurrent with a similar state power. As a consequence, the Court, consonant with its approach in taxing cases, where *concurrent* powers were also involved, drew a line

between federal and state sovereignty in holding that the statute unconstitutionally transgressed state sovereignty, but in doing so, it was careful to state: *"We are not concerned at this time with the applicable rule in situations where the central government is at liberty (as it is under the Commerce Clause when such a purpose is disclosed) to exercise a power that is exclusive as well as paramount."* (Emphasis supplied.) *Id.*, at p. 338. Thus, not only does the *Hopkins* case *not* constitute authority for the contention urged by the States, but the care with which the Court delineated the problem before it strongly suggests a contrary result had the legislation been an exercise of the power of Congress to regulate commerce. It is at most additional authority for the result I would reach.

The States, in the stipulations which we earlier mentioned, have presented extensive evidence to show the far-reaching financial impact on them of the 1966 Amendments. The proof tends to show that the graduated financial burden, resulting from escalation of the minimum wage and contraction of maximum hours without payment of overtime over a period of years, will necessitate either increased taxes or a curtailment of essential services. There is before us evidence that current budgetary appropriations will be insufficient to meet the increased costs resulting from the 1966 Amendments during the current fiscal period, and that in many instances, political subdivisions, restricted by organic la wto maximum limits of taxation and borrowing, are currently operating at these maxima so that, absent ganic law to maximum limits of taxation and borrowing, be required to curtail the amounts spent for teachers, text books and the like, or reduce the number of people served, if they are required to comply with the 1966 Amendments.

As I said earlier, this data is not excluded on evidentiary principles. It is properly before us — if only to put flesh on the skeletal frame of this litigation. But, in the decision of the constitutional issues presented to us, it, and the arguments of unconstitutional impairment of state sovereignty predicated upon it, are largely irrelevant. I have concluded that the 1966 Amendments are valid and constitutional, as is the enterprise concept of the 1961 Amend-

ments, and that there is no unconstitutional impairment of the sovereignty of the plaintiff States. The financial impact of the 1966 Amendments on the States is an argument to be addressed to Congress and not to the courts. As Chief Justice Marshall authoritatively stated in *Gibbons v. Ogden*, 9 Wheat. 1 (1824):

> "If, as has always been understood, the sovereignty of Congress, though limited to specified objects, is plenary as to those objects, the power over commerce with foreign nations, and among the several States, is vested in Congress as absolutely as it would be in a single government, having in its constitution the same restrictions on the exercise of the power as are found in the constitution of the United States. *The wisdom and the discretion of Congress, their identity with the people, and the influence which their constituents possess at election, are, in this, as in many other instances, as that, for example, of declaring war, the sole restraints on which they have relied, to secure them from its abuse. They are the restraints on which the people must often rely solely, in all representative governments.*" (Emphasis supplied.) *Id.*, at p. 197.[21]

Even more specific in stating the principle that the financial impact of the 1966 Amendments is no guide to their validity is *Oklahoma ex rel Phillips v. Guy F. Atkinson Co.*, 313 U.S. 508 (1941). In that case, the federal government planned to flood certain lands belonging to Oklahoma. The state sought an injunction, arguing, *inter alia*, that the project as planned would take much land unncessarily, without serving the purpose of the dam. The Court declared:

> "Such matters raise not constitutional issues but questions of policy. They relate to the wisdom, need, and

[21] The vitality of the principle announced has not been eroded by time. *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 255 (1964); *Polish Alliance v. N.L.R.B.*, 322 U.S. 643, 650 (1944); *Oklahoma ex rel Phillips v. Guy F. Atkinson Co.*, 313 U.S. 508, 527-528 (1941); *Sanitary District v. United States*, 266 U.S. 405, 432 (1925).

effectiveness of a particular project. They are, therefore, questions for the Congress not the courts. * * * *Nor it is for us to determine whether the resulting benefits to commerce as a result of this particular exercise by Congress of the commerce power outweighs the costs of the undertaking.*" (Emphasis supplied.) *Id.*, at pp. 527-528.

To a further allegation that tax revenues of Oklahoma would be diminished because of loss of property taxes on the seized land, and the public education might be hampered because certain school buildings, on the condemned land, would have to be rebuilt elsewhere, the Court said:

> "*The possible adverse effect on the tax revenues of Oklahoma as a result of the exercise by the federal government of its power of eminent domain is no barrier to the exercise of that power.*" (Emphasis supplied.) *Id.*, at p. 534.[22]

I conclude that defendants' motion for summary judgment should be granted, but in view of the fact that my conclusions are shared only in part by Chief Judge Thomsen, and not at all by Judge Northrop, counsel may present a form of decree declaring the minimum wage provisions of the 1966 Amendments valid and constitutional and denying plaintiffs' prayers for injunctive relief.

HARRISON L. WINTER,
United States Circuit Judge.

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[22] Although not as explicit, several of the authorities discussed in the text support the rule that when the commerce power is exercised the test of validity of the exercise is *not* the cost to the States. In *California v. Taylor, supra,* the State was exposed to payment of the higher wages for state employees arrived at as a result of collective bargaining rather than the scale prescribed by state fiat. The result of the decision in *United States v. Ohio, supra,* would be presumably to increase the state's cost for wheat and flour supplies purchased from the market place rather than grown on the prison farm. In *Case v. Bowles, supra,* price controls on the sale of timber decreased school revenues so that services would have to be reduced or school taxes increased. The penalties exacted in *United States v. Ohio, supra,* and *United States v. California, supra,* represented a diminution of general state revenues otherwise available to support other state activities.

THOMSEN, Chief Judge, concurring in part:

I agree with the conclusion reached by Judge Winter — that the injunction requested by plaintiff should be denied — but for somewhat different reasons and with one important reservation. I agree that the operation of schools and hospitals by the several States and their subdivisions affects interstate commerce to a substantial degree, whether or not such operations themselves constitute interstate commerce, and that use of the "enterprise concept" does not itself render unconstitutional the 1966 Amendments to the Fair Labor Standards Act. The potential Eleventh Amendment problems, suggested by the States, should be considered as they may arise in subsequent actions against the several States. But I cannot agree that the power of the federal government to regulate essential sovereign functions of the States is absolute and unqualified, despite the broad language of the opinions cited by Judge Winter.

When the thirteen sovereign States adopted the Constitution they gave up only part of their sovereignty to the United States of America. The system created by the Constitution was and is a federal system; the States are not administrative divisions of a central government. For reasons which were reviewed by Judge Wisdom in *United States v. Manning*, W.D. La., 215 F. Supp. 272 (1963), and are not disputed, the Tenth Amendment was adopted in 1791. To characterize that Amendment as a "truism" does not mean that it was intended to be devoid of meaning, lulling the States into acceptance of a national government which may, without further amendment to the Constitution, take away from the States the substance, if not the trappings, of the sovereignty which they intended to preserve. The Tenth Amendment makes explicit the principle of federalism, which recognizes the supremacy of the federal government with respect to the powers delegated to it, but also recognizes that the States retained certain sovereign powers. The sovereign powers retained by the States are not specified in the Tenth Amendment or in any other provisions of the Constitution; they are limited

only by the scope and thrust of the powers delegated to the federal government.

The power to regulate interstate commerce delegated to the federal government has been held to be "plenary" and has been accorded a very wide range by the Supreme Court. The cases in which the extent of the commerce power has been discussed in relation to the Tenth Amendment fall into two categories: those in which the regulation was being applied to and challenged by a party other than a State or a political subdivision, and those in which the regulation was being applied to and challenged by a State itself or by a political subdivision of a State.

In the first category, the pendulum has swung away from decisions[1] which restricted the commerce power. Since 1937 the Supreme Court has consistently held that the federal regulatory power under the commerce clause may control intrastate activities which merely affect commerce.[2]

The cases involving federal regulation of activities engaged in by the States or their subdivisions have been analyzed in Judge Winter's opinion. Some of them involved the competing interests of several States,[3] the treaty power,[4] the power over foreign commerce,[5] or the war power.[6] Others involved the operation by a State of a

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[1] *Hammer v. Dagenhart*, 247 U.S. 251 (1918); *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935); and *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936).

[2] *United States v. Darby*, 312 U.S. 100 (1941); *N.L.R.B. v. Jones & Laughlin*, 301 U.S. 1 (1937); see also *Wickard v. Filburn*, 317 U.S. 111 (1942); *Katzenbach v. McClung*, 379 U.S. 294 (1964); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964).

[3] *Sanitary District of Chicago v. United States*, 266 U.S. 405 (1925); *United States v. Appalachian Electric Power Co.*, 311 U.S. 377 (1940).

[4] *Sanitary District of Chicago v. United States, supra.*

[5] *Board of Trustees of University of Illinois v. United States.* 289 U.S. 48 (1933).

[6] *Case v. Bowles*, 327 U.S. 92 (1946).

railroad,[7] a waterfront terminal[8] or the dominion which the federal government has, "to the exclusion of the states," over navigable waters of the United States.[9] The opinions in some of those cases state the power of the federal government over interstate commerce in broad and unqualified terms, indicating that when Congress exercises its power over interstate commerce, the welfare or needs of the States need not even be considered. The broad language of the opinons must, however, be read in the context of the cases in which they were rendered. In none of those cases were the essential taxing and budgetary functions of the States so seriously affected as they are by the statute under consideration. We must heed the admonition in *Gomillion v. Lightfoot*, 364 U.S. 339, at 343-344: "Particularly in dealing with claims under broad provisions of the Constitution, which derive content by an interpretative process of inclusion and exclusion, it is imperative that generalizations, based on and qualified by the concrete situations that gave rise to them, must not be applied out of context in disregard of variant controlling facts."

The question remains: Does the principle of federalism, implicit in the Constitution as originally drawn, and made explicit by the Tenth Amendment, prevent Congress from regulating, in the manner provided by the 1966 Amendments, the operation of public schools and hospitals by the States and their subdivisions?

The States cite a number of cases arising under the taxing power, to the effect that the taxing power is subject to limitations imposed by the principle of federalism, and argue that similar limitations apply to the commerce power. Limitations on the taxing power have been recognized when the exercise of that power would unduly inter-

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[7] *United States v. California*, 297 U.S. 175 (1936); *California v. Taylor*, 353 U.S. 553 (1957); see also *Parden v. Terminal R. Co.*, 377 U.S. 184 (1964).

[8] *California v. United States*, 320 U.S. 577 (1944).

[9] *City of Tacoma v. Taxpayers*, 357 U.S. 320 (1958); *State of Oklahoma v. Guy F. Atkinson Co.*, 313 U.S. 508 (1941).

fere with the governmental activities of the States.[10] "This principle is implied from the independence of the national and state governments within their respective spheres and from the provisions of the Constitution which look to the maintenance of the dual system." *Indian Motorcycle Co. v, United States,* 283 U.S. 570, 575 (1931). [11] The States argue that the reach of the commerce power is no greater than the reach of the taxing power, citing a statement from one of the opinions in *New York v. United States,* 326 U.S. 572, 582 (1946): "Surely the power of Congress to lay taxes has impliedly no less a reach than the power of Congress to regulate commerce." It must be recognized, however, that a limitation has been placed upon the taxing power which has not yet been placed upon the commerce power.

In another opinion in *New York v. United States,* Chief Justice Stone, concurring for himself and three other Justices, stated:

> "* * * we are not prepared to say that the national government may constitutionally lay a non-discriminatory tax on every class of property and activities of States and individuals alike. * * * [A] federal tax which is not discriminatory as to the subject matter may nevertheless so affect the State merely because it is a State that is being taxed, as to interfere unduly with the State's performance of its sovereign functions of government. * * *" 326 U.S. at 586-587.
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> "The problem is not one to be solved by a formula, but we may look to the structure of the Constitution as our guide to decision. * * *" 326 U.S. at 589.

The limitation on the taxing power — undue interference with a State's performance of its sovereign functions of government — responds to Chief Justice Marshall's famous dictum: "The power to tax involves the power to destroy". *McCulloch v. Maryland,* 4 Wheat. 316, 431

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[10] *Graves v. New York ex rel. O'Keefe,* 306 U.S. 466, 477, 478 (1939).

[11] See also *New York v. United States,* 326 U.S. 572, 577 (1946); *Willcuts v. Bunn,* 282 U.S. 216 (1931).

(1819). The potentially destructive power of taxation lies in the ability of one sovereign to impose an economic burden upon the functions of the other too great to be borne, thereby curtailing or eliminating a particular activity.

Taxation is not the only way in which the federal government may destroy or cripple essential State functions. There must be some limit beyond which the federal government cannot go in its attempt to exercise against the States themselves the power of the federal government over interstate commerce. Neither the Solicitor of Labor, who argued the case for all the defendants, nor Judge Winter in his opinion, denies that there may be some limit, but they argue and hold respectively that whatever limit there may be has not been exceeded in this case.

The proper limit is indicated, though not fixed, by the statement of Chief Justice Stone, quoted above, that "a federal tax which is not discriminatory as to the subject matter may nevertheless so affect the State merely because it is a State that is being taxed, as to interfere unduly with the State's performance of its sovereign functions of government." The attempted exercise against a State of the power of the federal government over interstate commerce should face the test: does it interfere unduly with the State's performance of its sovereign *and indispensable* functions of government? If the concept of federalism is to survive, it must stand on constitutional limitations, not on the sufferance of the federal government.

When the federal government invokes the commerce power, unaided by the Fourteenth Amendment or any other constitutional provision, to regulate the relations between a State and state employees who are not themselves engaged in interstate commerce or in the production of goods for commerce, the Court should consider a number of factors in determining the constitutionality of the proposed regulation. The Court should give weight and deference to any congressional findings with regard to the effect which the action sought to be regulated has on interstate commerce. The Court should also consider whether

the activity subject to the proposed regulation is an important function of the State and its political subdivisions; whether the service in question is offered or might be offered to the same extent and on substantially the same terms by private enterprise or other non-state sources; and whether such regulation would seriously interfere with the State's performance or regulation of its indispensable sovereign functions.

The statute enacting the 1966 Amendments contains no congressional findings with respect to the relationship between interstate commerce and the proposed coverage of state employees.[12]

The operation of public schools and hospitals is undoubtedly one of the most important functions of State governments. The Supreme Court in *Brown v. Board of Education*, 347 U.S. 483, 493 (1954), stated flatly: "Today, education is perhaps the most important function of state and local governments." The importance of public hospitals to the community is also beyond dispute.

Public hospitals in many instances provide service otherwise unavailable.[13] The public schools and hospitals could

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[12] Findings with respect to labor conditions in industries engaged in commerce or in the production of goods for commerce, were included in the original Fair Labor Standards Act, see 29 U.S.C.A. 20,2(a).

[13] In Maryland 867 beds, all publicly owned and operated, constitute the total facilities for tubercular care in the State of Maryland. A similar situation exists in Texas. Under Texas law, on the discovery of tuberculosis the patient can be committed to a state hospital until the disease is no longer communicable. But non-state hospital beds for tubercular patients are virtually non-existent and the few that are available are extremely expensive. Similarly, approximately 90% of the facilities for the mentally disturbed and mentally retarded in Maryland are provided by the State, and, undoubtedly, much the same proportion applies in other States. Moreover, it is the public hospital which bears the main burden of providing care for the indigent. In Texas, for example, most of the people in State mental institutions are charity or near charity patients. In the Texas tubercular hospitals only nine out of 2,900 patients paid for the complete cost of their hospital care in 1966. The necessity of keeping

not be replaced by nongovernmental enterprises.[14] The alternative would be federal schools and hospitals, and no one has argued for that.

From the mass of evidence submitted to the Court pursuant to stipulation, it is clear that the impact of the 1966 Amendments on the States is far-reaching. The Act imposes upon the States a graduated financial burden, which will necessitate either increased taxes or a curtailment of the services now being rendered by the States and their political subdivisions. Most of the States must operate out of current funds provided by budgetary appropriations,[15]

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the mentally disturbed and those ill with communicable diseases away from the community at large is too obvious to require elaboration.

[14] In Maryland approximately 80% of the total number of secondary and elementary school students are enrolled in public schools. In Texas and Ohio the comparable figures are approximately 86% and 84% respectively. The great majority of the other schools are either parochial or religiously affiliated. In Maryland public institutions of higher education served 74% of the students enrolled toward degree credit. In Texas and Ohio the comparable figures were 77% and 63% respectively. In 1965 over half the hospital beds in Maryland were located in hospitals operated by State and local governments. It is true, as defendants note, that these hospitals accounted for only 15% of the total admissions, but that figure reflects their role in treating the chronically ill and long-term mental and tubercular patients. In Texas, State hospital beds account for almost half the total number of beds in all Texas hospitals, and for about 25% of the admissions. State and local government hospitals in Ohio provided almost half the total number of hospital beds in the State and accounted for about 15% of the admissions.

[15] Thus, Texas represents to the Court that in order to meet the standards of the Fair Labor Standards Act the expenditures of the Texas Youth Council will be increased by over $3,000,000 annually; the Department of Mental Health and Mental Retardation will need an additional $7,500,000 annually; the cost of the Institutions of Higher Education will go up over $3,250,000 annually and the Fort Worth Independent School District will need by 1971 to find additional tax revenue sources for approximately $575,000 annually. Even though the Fort Worth District is one of the larger districts in the State, there are over 1,300 other Independent School Districts whose cost will be increased proportionately and who also must find additional sources of revenue. Many of these districts have reached their constitutional tax rate limit as well as property value limitations.

and in many instances the responsible political subdivisions, notably school districts, are taxing at their constitutional maximum and would have to curtail the amounts spent for teachers, textbooks and the like, or reduce the number of people served, unless and until the State constitution is amended.

Nevertheless, I cannot say that the minimum wage provisions interfere so *unduly* with the State's performance of their indispensable sovereign functions as to make those provisions unconstitutional. It is of course true, as Judge Northrop points out, that the minimum wage provisions interfere with the budgetary function of the States. But that interference must be weighed against the interest of the federal government, representing all the people of the United States, in seeing that all the people are paid an appropriate minimum wage. Serious problems are presented by the possible application of the Act to work done by inmates of correctional and other institutions as part of their education or rehabilitation programs, but I agree with the Solicitor of Labor that these can best be handled by the regulations or on a case by case basis, and do not justify a sweeping injunction.

The overtime provisions present a more serious problem. Unlike the minimum wage provisions, the overtime provisions are not limited to the lowest paid employees. Many State functions, including some which are affected by the 1966 Amendments, require work arrangements other than the standard 40-hour work week. Public school, college and university personnel, who generally receive lengthy vacations, must often work longer than 40 hours per week during some part of the school year. The statute under consideration makes some provision in this regard for the employees of hospitals, whose round-the-clock requirements do not fit comfortably into a 40-hour work week.[16] A common practice has been to give these and other State employees compensatory time, or to make various other budgetary arrangements to keep in fair balance State jobs of the most diverse character. If the overtime provisions

[16] 29 U.S.C.A. 207(j) (1966 Cum. Supp.).

of the 1966 Amendments are valid, many of those arrangements may no longer be possible. The Act will seriously hamper the organizational and budgetary functions of the States by forcing them to favor employees of their hospitals and schools over other programs such as welfare and law enforcement, unless the States rearrange their entire civil service and appropriate additional sums for employees not covered by the Act.

For reasons stated above, I am satisfied that a line must be drawn, and that with respect to some if not all state employees covered by the 1966 Amendments the overtime requirements of the Act probably go beyond the permissible limits. The interference with the organizational and budgetary functions of the States has been noted. On the other hand, Congress has not stated, and neither the committee hearings nor the stipulated facts in this case show, what if any effect on interstate commerce the overtime practices of the several States may have. The issue in each instance is whether the particular regulation *unduly* interferes with one or more indispensable sovereign functions of the State. This indicates that the question whether the application of the overtime provisions of the statute to state employees goes beyond the permissible limits should be decided in the context of particular cases, when the extent of the interference with an indispensable state function can be weighed against the effect, if any, which the State's overtime practices have on interstate commerce.[17]

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[17] At the hearing of this case the Solicitor of Labor argued for all of the defendants. He was asked from the Bench whether and where a line should be drawn. Without conceding that any line should be drawn in this case, and without withdrawing from his position that the plenary power of the federal government over interstate commerce applies to the States as well as to individuals, the Solicitor suggested: "* * * we have such a variety of situations that it may not be the path of wisdom to try to issue any blanket rule [to cover] the variety of different situations demonstrated [by the stipulations with respect to] Maryland, Ohio and Texas, and which can be assumed to exist in a multiplicity of cases throughout the fifty states." Tr. p. 193. The Solicitor concluded "that this is not the appropriate place and case for blanket injunctions or orders on a blanket basis so far as the application of this rule to schools

I conclude that a sweeping injunction at this time would not be proper.

The denial of relief in this case should be without prejudice to the right of the several States and their political subdivisions to challenge the overtime provisions of the Act applicable to employees of the States and their political subdivisions, in future cases presenting specific situations.

NORTHROP, District Judge, dissenting

I am compelled to dissent from the conclusions reached by Judge Winter and Judge Thomsen that this Act is not unconstitutional.

The majority recognizes that this is a case of first impression involving a conflict between Congress' power under the Commerce Clause and state sovereignty as recognized in our Constitution.

Judge Winter concludes that the power of Congress under the Commerce Clause has no boundaries and Congressional preemption in this field is supreme, it mattering not that it would destroy the constitutionally recognized sovereignty of the states. To put it simply, he holds that from the beginning federalism, as embodied in our Constitution, existed by the will of Congress rather than by the will of the people. No case has gone that far. It is supported neither by history nor by the structure of the Constitution.

In his concurring opinion, Judge Thomsen recognizes that there is implicit within the concept of federalism embodied in the Constitution a limitation on the power of

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and hospitals are concerned. Instead, it would seem most appropriate if such a new line were conceived and fashioned, if it should be, that the concept and the fashioning of it should not be for this Court, but by the Supreme Court in any later proceedings, or perhaps, as I have suggested several times before, it should be done as cases actually come up in the future and action is taken where we can get a full exposure of all of the different facts and facets on issues that may well be presented at that future time." Tr. pp. 204, 205.

Congress under the Commerce Clause. However, he feels that the minimum wage provisions of the Act as they affect the states do not transgress the limitation imposed by the Constitution upon Congress. But he expresses serious doubts as to the constitutionality of the overtime provision of the Act as it affects the states. Nevertheless he concludes that question is not yet ripe for adjudication. As to it, he would wait until the Department of Labor promulgates and applies its regulations to the states and decide constitutionality on a case-by-case basis.

Although I agree with Judge Thomsen's analysis of the pertinent cases and some of his reasoning as to the effect of the amendment on the states, I cannot agree with his conclusions. Unless the Department of Labor emasculates the Act, there will be no way for this or some other court to avoid the constitutional question posed herein.

The question before us is whether this Congressional exercise of power under the Commerce Clause constitutes an undue infringement upon the "performance of [the state's] function as a government which the Constitution recognizes as sovereign."

This quotation is from Chief Justice Stone's opinion in New York v. United States, 326 U.S. 572, at 588, 66 S. Ct. 310, at 317, in reference to the limits on the taxing power of Congress. Although it is recognized that the power under the Commerce Clause may be broader, it must have some limits. The language of Chief Justice Stone suggests such a limitation.

We are concerned here with the separation of powers between national and state government established by our Constitution. This concept of federalism has been carefully preserved throughout our history by the courts, not by exhorting the Congress on the one hand or the state legislatures on the other to restrain their actions so as not to trespass on the rights, responsibilities, and duties of the other.

I cannot agree that it is a political question for the state to importune the Congress not to raise the salaries of

state employees, thus forcing the state legislature to tax its people to pay those employees. This is a direct transgression on the concept of federalism, which must be determined by the courts. The case before us is a perfect example of the wisdom of Constitutional rather than Congressional federalism. The amendment, through which the states are subjected to the Fair Labor Standards Act, was enacted without notice to the states so that they might be heard and without any thought being given to the effect of the Act on them. Surely the statement of one Congressman, even in the committee of the whole, did not alert the states, or constitute a Congressional finding, or give this Act a purpose as applied to the states as the majority would wish. [Note 10, Judge Winter's opinion.]

This case then brings into confrontation the powers of Congress under the Commerce Clause with the concept of dual sovereignty or federalism as embodied in our Constitution, which is articulated in the Tenth Amendment.

The effect of this Act must be measured against the Constitution precisely and its impact cannot be softened by what regulation a department of the national government might promulgate in its application.

What then is its effect on the state government?

By this Act Congress is forcing under threat of civil liability and criminal penalties, the state legislature or the responsible political subdivision of the state

1. to increase taxes (an impossibility in some of the political subdivisions without a state constitutional amendment); or

2. to curtail the extent and calibre of services in the public hospitals and educational and related institutions of the state; or

3. to reduce indispensable services in other governmental activities to meet the budgets of those activities favored by the United States Congress; or

4. to refrain from entering new fields of governmental activity necessitated by changing social conditions.

The allocation of the state's revenue among government activities is the most important function of state government, for it determines the extent and calibre of service which a state can supply. State governments must provide services out of current tax funds. The state government and its political subdivisions are particularly sensitive to the needs of the people and their ability to pay for the indispensable governmental functions that must be furnished.

The budget is, therefore; under constant study by both the executive and legislative branches of the state's government. Not only does the appropriation bill demand the highest consideration of the legislature while it is in session, but it also requires most of the attention of the executive and the interim legislative committees between sessions.*

There is only so much revenue available. The wise allocation of this money demands this constant up-to-the-minute knowledge of state and local governmental officials intimately concerned with the requirements and priorities to be allotted among the health, welfare, education, law enforcement, urban, pollution, and other demanding governmental functions, each of substantial importance. The states' Congressional delegations neither have the time, nor knowledge, nor is it their function to become involved in the vital details of state fiscal policy.

Perhaps all of the above can be expressed more graphically by a recent news story in the Baltimore Sun, which undoubtedly is repeated hundreds of times across the nation:

"It is budget time again in Howard County. . . .

"What particularly worries the commissioners is that the school budget [the largest expenditure of the

* For example, consider the reports of the Maryland General Assembly's Committee on Taxation and Fiscal Affairs from 1955 to date, the Maryland Legislative Council's Report for any year and countless other such documents reflecting the prodigious amount of time and effort put forth by state officials to supply governmental services. These documents may be found in the Archives of the Council of State Governments.

county government] has gone up on an average of 22 per cent each year while the taxable income goes up only 15 per cent and assessments only 9 percent." The Evening Sun (Baltimore), April 6, 1967.

The impact of a mandatory allocation of state-collected revenues by Congress among the indispensable state governmental services is thus readily demonstrated. It amounts to the national government compelling state government action and controlling and operating the state government with little or no knowledge of the requirements of its citizens or the financial ability of those citizens to pay the bill.

The Congress, under the theory of this Act, can manipulate state governments by increasing the state functions to come under the "enterprise" concept or removing exemptions for classes of state employees at will without notice to the state, and all at the expense of the state. This Act is thus an intrusion of first magnitude into the functioning of state government now, is potentially without limit, and carries with it the formula for the destruction of the concept of federalism.

Congress has heretofore carefully avoided interjecting the national power into state or local governmental functions. Although grants-in-aid and matching funds might have that effect, these have a contractual basis — a far cry from mandatory direction. This Congressional reluctance in and of itself indicates a recognition of the Constitutional principle of federalism.

The careful nurturing of the concept of federalism has come to fruition since World War II in the increasing initiative of the states in meeting new problems brought about by the great social changes in our nation. The momentous "Metropolitan Problem" has caused the creation of new forms of local government in many of the affected areas. The wisdom of local administration has been clearly demonstrated. We are seeing many more governmental activities being undertaken by the federal and state governments on a recognized partnership basis

directed at solving our internal problems. In light of the above examples of voluntary movement toward national and state partnership, rather than compulsion, it would indeed be tragic at this point in history to expand and broaden the power of the federal government over the state governments in the exercise of their necessary governmental functions under the guise of the "Commerce Clause" to a point never heretofore reached by any decision. To substitute now the delayed and ponderous action of a remote central government would atrophy and stifle this progress.

Alexis de Tocqueville in his *Democracy in America* said it in this manner:

> ". . . I cannot conceive that a nation can live and prosper without a powerful centralization of government. But I am of the opinion that a centralized administration is fit only to enervate the nations in which it exists, by incessantly diminishing their local spirit. Although such an administration can bring together at a given moment, on a given point, all the disposable resources of a people, it injures the renewal of those resources. It may insure a victory in the hour of strife, but it gradually relaxes the sinews of strength. It may help admirably the transient greatness of a man, but not the durable prosperity of a nation." Vol. I, pp. 86-87 (Bradley ed., New York, 1946).

Thus, the limitation upon a power, which has been delegated to the federal government — including the power to relegate commerce among the states — and which deals with the internal affairs of this nation, is reached when Congress exercises that power so as to interfere unduly in some manner with the state's performance of an indispensable governmental activity. The Act as applied to employees of public schools, hospitals, and related institutions is unconstitutional because it is an undue infringement upon the performance of an indispensable and fundamental governmental function (its taxing and budgetary function) of the state, which the Constitution recognizes as sovereign.

The proof of the wisdom of the federal concept is implicit in the name of our government — the "United States". It cannot be said more succinctly.

JUDGMENT

(Filed June 26, 1967)

This cause having come on for final argument and the parties having agreed to present this case for final decision on a stipulated record; and the plaintiffs in their complaints having prayed for a declaratory judgment and a preliminary and permanent injunction; and the court having received argument and briefs from the parties; now therefore, this 26th day of June 1967, it is

ORDERED, ADJUDGED AND DECREED:

Plaintiffs' motion for summary judgment and prayers for interlocutory and permanent injunctive relief are denied for the reasons set forth in the opinions of the Court.

Accordingly, this action is dismissed without costs to either party.

/s/ HARRISON L. WINTER,
Circuit Judge.

/s/ ROSZEL C. THOMSEN,
District Judge.

.....
District Judge.

In The United States District Court
For The District of Maryland

Civil Action No. 18005

State of Maryland

Plaintiff

v.

W. Willard Wirtz, Secretary of Labor,
United States Department of Labor,
Clarence T. Lundquist, Administrator of the Wage
and Public Contracts Division of the United
States Department of Labor

and

William Hargadine, Jr., Regional Director, Third
Region, Wage and Hour and Public Contracts
Division, United States Department of Labor

Defendants

COMPLAINT FOR DECLARATORY JUDGMENT, TEMPORARY RESTRAINING ORDER AND INJUNCTION

The State of Maryland, on behalf of itself and its various departments, boards, commissions, agencies, and political subdivisions, Plaintiff, by Francis B. Burch, Attorney General of Maryland, Robert F. Sweeney, Deputy Attorney General, and Franklin Goldstein, Loring E. Hawes and Alan M. Wilner, Assistant Attorneys General, its attorneys, sues W. Willard Wirtz, Secretary of Labor; Clarence T. Lundquist, Administrator of the Wage and Hour and Public Contracts Division of the United States Department of Labor, and William Hargadine, Jr., Regional Director of the Third Region, Wage and Hour and Public Contracts

Division, United States Department of Labor, Defendants, and respectfully represents unto the Court:

1. This action is instituted to seek a declaratory judgment as to the validity under the United States Constitution of the Fair Labor Standards Act (Title 29 U.S.C. § 201, et seq.; 52 Stat. 1060, as amended), particularly as the same was amended by P. L. 89-601 (80 Stat. 830); and to enjoin and restrain Defendants, individually, collectively, or through their agents or employees, from enforcing or attempting to enforce said Act against the State of Maryland, its political subdivisions and agencies, to the extent that said State or political subdivisions, through their respective departments, boards, commissions, agencies, or employees are engaged in the performance of governmental functions. The amended Act is attached hereto as Exhibit "A".

2. This Court has jurisdiction to hear and determine this cause by virtue of Title 28 U.S.C. § 1337, conferring original jurisdiction over any civil action or proceeding arising under any Act of Congress regulating commerce; and Title 28 U.S.C. §§ 2201 and 2202, the federal Declaratory Judgment Act. A statutory three-judge Court is requested pursuant to Title 28 U.S.C. §§ 2282 and 2284.

3. The State of Maryland is a sovereign State; and, under the Tenth Amendment to the United States Constitution, is entitled to exercise all of the powers of government not delegated to the United States or prohibited by the Constitution. Among the governmental powers so committed to the State of Maryland are the powers to:

(a) Establish, operate, finance and otherwise provide for a system of public schools, at the elementary, secondly, and collegiate level, and other institutions of higher education, as well as a system of public hospitals, health facilities, and institutions for the handicapped and retarded persons.

(b) Employ, upon such terms and conditions as it may deem appropriate, personnel to carry out these and other governmental functions of the State.

4. Part of the power not delegated to the United States, and, therefore, reserved to the States and the people, was

the power to determine how the operations of the State government shall be financed. The people of Maryland expressed this determination in Article III, Sections 32 and 52 of the Constitution of Maryland, the text of which is attached hereto as Exhibit "B". These sections provide that no funds shall be expended by the State or any of its agencies except pursuant to an appropriation by the General Assembly.

The State of Maryland has established a Merit System for its employees and pursuant thereto wages, salaries, job classification, hours of work and other conditions of employment are regulated in order to achieve a measure of fairness and to provide incentives for persons in State service. All State salaries and wages so determined in accordance with the merit system procedures are incorporated in the annual budget submitted by the Governor to the General Assembly. Once so established, such wages and salaries cannot be changed except in accordance with the Constitution of Maryland and laws enacted pursuant thereto.

The wages and salaries of personnel employed in the public school system of Maryland (except at the collegiate level) are determined by the various county boards of education, and the Board of School Commissioners of Baltimore City, created by State law. A major share of the cost of such wages and salaries, however, is borne by the State pursuant to Article 77, § 220 et. seq. of the Annotated Code of Maryland; and the funds for the State's share must be appropriated by the General Assembly, in accordance with the State Constitution.

5. When the Fair Labor Standards Act was originally passed in 1938, the definition of "employer", found in Title 29 U.S.C. § 203 (d) excluded "the United States or any State or political subdivision of a State"; and this statutory exclusion remained a part of the law until 1966.

By P. L. 89-601 (80 Stat. 830), the Congress, on September 23, 1966, amended § 203 of Title 29 as follows:

(a) The definition of "employer" was amended to provide.

Section 102(b) amends Section 3(d) of the Act to read as follows:

"'Employer' includes any person acting directly or indirectly in the interest of an employer in relation to an employee but shall not include the United States or any State or political subdivision of a State, 'except with respect to employees of a State, or a political subdivision thereof, employed (1) in a hospital, institution, or school referred to in the last sentence of subsection (r) of this section, or (2) in the operation of a railway or carrier referred to in such sentence', or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization."

(b) The definition of "enterprise" was amended to provide:

"Sec. 102. (a) Section 3(r) of such Act is amended by adding at the end thereof the following: 'For purposes of this subsection, the activities performed by any person or persons—

'(1) in connection with the operation of a hospital, an institution primarily engaged in the care of the sick, the aged, the mentally ill or defective who reside on the premises of such institution, a school for mentally or physically handicapped or gifted children, an elementary or secondary school, or an institution of higher education regardless of whether or not such hospital, institution, or school is public or private or operated for profit or not for profit, or . . . shall be deemed to be activities performed for a business purpose.'"

(c) The definition of "enterprise engaged in commerce or in the production of goods for commerce" was amended to provide:

Section 3(s) of such Act is amended to read as follows:

"(s) 'Enterprise engaged in commerce or in the production of goods for commerce' means an enterprise

which has employees engaged in commerce or in the production of goods for commerce, including employees handling, selling, or otherwise working on goods that have been moved in or produced for commerce by any person, and which . . .

(4) is engaged in the operation of a hospital, an institution primarily engaged in the care of the sick, the aged, the mentally ill or defective who reside on the premises of such institution, a school for mentally or physically handicapped or gifted children, an elementary or secondary school, or an institution of higher education (regardless of whether or not such hospital, institution or school is public or private or operated for profit or not for profit)."

6. The effect of enforcement of the aforegoing amendment, if valid, would be:

(a) To require the State of Maryland, in the absence of an appropriation by the General Assembly, and therefore in violation of its Constitution, to expend additional sums for wages and salaries of certain of its personnel, and of the personnel employed in the public school system; or

(b) To require the General Assembly to make such an appropriation, and thereby circumscribe and control its legislative discretion; and

(c) To impose a substantial burden upon the State in the exercise of its governmental functions; and

(d) To nullify existing State laws, and the rules and regulations promulgated pursuant thereto, pertaining to the terms and conditions of employment of the employees of the State and its political subdivisions, to the extent that such employees may be covered by the federal Act.

7. The foregoing effects of enforcement of the amendments would cause immediate and irreparable damage to the State, its subdivisions and agencies, in the following respects:

(a) The State would never be in a position to adequately establish a budget and forecast revenue needed for the

future operation of its complex structure if expenditures could not also be equally forecast and regulated by the State or political subdivisions unfettered by external regulation and control.

(b) The State Merit System of classification of employees in similar jobs at similar rates of pay and hours of work would be immediately destroyed with the result that a serious morale problem among personnel would undoubtedly arise.

(c) State agencies and subdivisions required to provide necessary services to the public would be faced with having to curtail such services in order to meet the federal requirements.

(d) Research contracts would have to be curtailed or eliminated where the estimated cost of such programs was based on State wage and hour provisions.

8. The application of the Fair Labor Standards Act to employees of the State of Maryland and its political subdivisions, as provided by P. L. 89-601, is in contravention of the United States Constitution in each of the following respects:

(a) It violates the Tenth Amendment to said Constitution in that the power to regulate or tax the governmental functions of the State of Maryland was not, directly or indirectly, explicitly or implicitly, delegated to the Congress of the United States; that the purported exercise of such power is therefore beyond the Constitutional authority of Congress, trespasses on the rights reserved to the States and invades the sovereignty of the State of Maryland.

(b) The exercise of governmental functions, such as the operation of a public school system, hospitals and other institutions enumerated in the Act, does not constitute "commerce" within the meaning of Article I, Section 8 of the United States Constitution; that the Congress may not, by its own legislative Act, expand the Constitutional meaning of the term "commerce" and thereby proceed to regulate that which is not commerce; and that, if such govern-

mental functions do not constitute commerce, Congress has no other Constitutional power to regulate them.

9. The Defendants, through their agents and employees, have threatened to enforce the Fair Labor Standards Act against the State of Maryland and its political subdivisions in accordance with P. L. 89-601, and to apply the penalties provided for therein unless the State and subdivisions comply with it.

10. By reason of the facts herein alleged and by reason of the fact that the Act, as amended, hereinabove referred to, shall become effective on February 1, 1967, the Plaintiff will suffer immediate and irreparable damage unless a temporary restraining enforcement thereof pending a hearing on the merits of this case, be issued forthwith.

Wherefore, Plaintiff prays this Honorable Court:

1. That a temporary restraining order without notice be issued forthwith restraining the Defendants, their agents, servants, employees and attorneys from enforcing the provisions of the Fair Labor Standards Act, as amended by P. L. 89-601, against the State of Maryland, its political subdivisions and agencies, until the ultimate disposition of this case after a hearing on the merits, pursuant to 28 U.S.C. § 2284 (3).

2. That a three-judge court be convened to hear and determine this case.

3. That the Court adjudge and declare that the application of the Fair Labor Standards Act to employees of the State of Maryland and its political subdivisions, as provided by P. L. 89-601, is in contravention of the United States Constitution in each of the following respects:

(a) It violates the Tenth Amendment to said Constitution in that the power to regulate or tax the governmental functions of the State of Maryland was not, directly or indirectly, explicitly or implicitly, delegated to the Congress of the United States; that the purported exercise of such power is therefore beyond the Constitutional authority of Congress, trespasses on the rights reserved to the

States and invades the sovereignty of the State of Maryland.

(b) The exercise of governmental functions, such as the operation of a public school system, hospitals and other institutions enumerated in the Act, does not constitute "commerce" within the meaning of Article I, Section 8 of the United States Constitution; that the Congress may not, by its own legislative Act, expand the Constitutional meaning of the term "commerce" and thereby proceed to regulate that which is not commerce; and that, if such governmental functions do not constitute commerce, Congress has no other Constitutional power to regulate them.

4. That a preliminary injunction be issued restraining and enjoining Defendants, their agents, servants, employees and attorneys from enforcing the provisions of the Fair Labor Standards Act, as amended by P. L. 89-601, against the State of Maryland, its political subdivisions and agencies until the final determination of this case, and that the trial of this case on the merits be advanced and consolidated with the hearing on this prayer for preliminary injunction.

5. That a permanent injunction be issued restraining and enjoining Defendants, their agents, servants, employees and attorneys from enforcing the provisions of the Fair Labor Standards Act, as amended by P. L. 89-601, against the State of Maryland, its political subdivisions and agencies.

6. And for such other and further relief to the Plaintiff that the equity and justice of its cause may require.

(Signatures of Counsel and Affidavit.)

MOTION TO DISMISS OR IN THE ALTERNATIVE FOR SUMMARY JUDGMENT

To the Honorable Judges of said Court:

Defendants respectfully move the Court to dismiss the above action or in the alternative to grant summary judgment for the reason that Public Law 89-601, amending the

Fair Labor Standards Act, 29 U.S.C. 201 *et seq.*, is constitutional insofar as it applies to employees of a State or a political subdivision thereof employed in a hospital, school, or similar institution.

Affidavits or stipulations of fact, in accordance with the Pre-Trial Order of February 1, 1967, will be relied upon in support of the motion herein.

(Signatures of Counsel.)

ORDER

It is hereby ordered this 27th day of February, 1967, that the Order of this Court filed herein on the 6th day of February, 1967, granting leave to the State of Texas to intervene as Intervenor herein is amended to read as follows:

> "Leave is hereby granted as prayed for in the Motion to Intervene as made by the State of Texas, one of the plaintiffs herein, and it is further ordered that said State of Texas, acting by and through its attorneys of record, is granted the full rights and privileges as a plaintiff herein."

/s/ ROSZEL C. THOMSEN,
Chief Judge.
United States District Court.

MOTION FOR SUMMARY JUDGMENT

The State of Maryland, by Francis B. Burch, Attorney General, Robert F. Sweeney, Deputy Attorney General, and Franklin Goldstein, Loring E. Hawes and Alan M. Wilner, Assistant Attorneys General, and the States of Alabama, Arizona, Arkansas, Colorado, Delaware, Florida, Hawaii, Iowa, Kansas, Maine, Mississippi, Missouri, Nebraska, New Jersey, New Mexico, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Texas, Virginia and Wyoming, by their respective Attorneys General, move the

Court to enter summary judgment in their favor, in accordance with Rule 56 of the Federal Rules of Civil Procedure, on the ground that the pleadings filed herein show that they are entitled to judgment as a matter of law.

Affidavits or stipulations of fact, in accordance with the Pre-Trial Order of February 1, 1967, will be relied upon in support of the motion herein.

(Signatures of Counsel and Certificate of Service.)

STIPULATIONS

The State of Maryland, by its undersigned counsel, and the Defendants herein, by their undersigned counsel, do hereby stipulate and agree to the following statements of fact.

I.

Fiscal Laws of the State of Maryland

1. *Article III, Section 32* of the Constitution of Maryland provides that:

> "No money shall be drawn from the Treasury of the State, by any order or resolution, nor except in accordance with an appropriation by Law . . .".

2. *Article III, Section 35* of the Constitution of Maryland provides that:

> "No extra compensation shall be granted or allowed by the General Assembly to any public Officer, Agent, Servant or Contractor, after the service shall have been rendered, or the contract entered into; . . .".

3. *Article III, Section 52* of the Constitution of Maryland provides that no money shall be appropriated except by a Budget or Supplementary Appropriation Bill. The Budget Bill is submitted to the General Assembly by the Governor, not later than the third Wednesday in January of each year and must contain a complete plan of proposed expenditures and estimated revenues for the next fiscal

year. The budget must contain an estimate of the salaries payable by the State, and sufficient funds for the establishment and maintenance of a thorough and efficient system of public schools throughout the State. Section 52 further provides that the General Assembly may not amend the Budget Bill so as to affect the provisions made by the laws of the State for the maintenance of a system of public schools.

* * * * * *

7. *Article 15A, Section 8* of the Annotated Code of Maryland, relating to amendments to the budget, provides that no such amendment shall increase the salary or salaries of any office or position beyond the amount for each such salary which is contained in the most recent State budget, except for amendments which effectuate salary changes authorized in cases of acute emergency in order to procure or to retain in the State service essential professional, technical and administrative personnel.

8. *Article 15A, Section 14* of the Annotated Code of Maryland provides that no department, board, commission, officer or institution of the State of Maryland shall at any time expend in excess of the total amount of its appropriation, and shall not expend in excess of the amount of any item in its appropriation except upon compliance with Article 15A, Section 8.

* * * * * *

10. *Article 31, Section 4* of the Annotated Code of Maryland provides that:

> "It shall be unlawful for the trustees, managers, directors or superintendent of any of the public institutions of the State of Maryland, to create a deficiency, incur a liability, or to expend a greater sum of money than is appropriated by the General Assembly of Maryland for the use of such public institution or department."

11. In the fiscal year 1966, 38.8% of the total cash disbursements by the State of Maryland will be for public education and public health, amounting to $311,600,000.00.

II.

State Merit System, State Employees' Standard Salary Board and State Retirement System

1. * * *

The purpose of the Merit System Law is to provide candidates for appointment to position in the classified service after determining by practical tests the fitness of such candidates for the positions which they seek, without regard to their political or religious opinions or affiliations. It is also to provide adequate means for the prompt removal from positions in the classified service of persons who may be indolent, incompetent, inefficient, or otherwise unfit to remain therein, and to keep in a workable state the provisions for the promotion of employees as provided in the Law to ensure that the best class of candidates will be attracted to the classified service. The State Commissioner of Personnel is the chief personnel officer for the State of Maryland, which at present employs approximately 26,850 classified and 3,100 unclassified employees.

The State Commissioner of Personnel is also Chairman of the State Employees' Standard Salary Board which is responsible for preparing and recommending to the Governor a pay plan for the State's classified and unclassified employees.

* * * * * *

2. *Article 64A, Section 27* of the Annotated Code of Maryland requires the State Employees' Standard Salary Board to prepare and recommend to the Governor a pay plan for all classes of positions in both the classified and unclassified service, to the end that all positions in such services involving comparable duties, experience, responsibilities and authority shall be paid comparable salaries in accordance with the relative value of the services performed. In establishing rates of pay, the Board is required to give consideration to experience, the prevailing rates of pay for the services performed, and for comparable services in public and private employment, living costs,

maintenance and other benefits received by employees, and the State's financial condition and policies. The pay plan does not become effective until approved by the Governor and funds therefor are appropriated by the General Assembly. With exceptions not relevant to this case, no changes may be made to the approved pay plan unless such changes are first approved by the Governor, and the funds therefor are appropriated by the General Assembly. Whenever the Board finds an increase in the market value of services performed by any class, it is the duty of the Commissioner of Personnel to identify and present to the Board for consideration at the same time all of the related classes which are affected by the same change in market value.

3. *Article 64A, Section 30* of the Annotated Code of Maryland requires the State Employees' Standard Salary Board to formulate rules and regulations which include provisions for automatic increases from minimum to maximum of the rates established by the schedule.

* * * * * *

7. The State of Maryland and the local school systems are presently paying the federal minimum wage to all of their employees. The State has established a 35½ hour work week for its employees. It is often necessary, however, to require that some of the employees work overtime hours. In some instances, under present State law, such employees are compensated for their overtime work at their normal rate of pay (i.e., "straight" time). In most cases, the State does not pay the overtime pay, but instead compensates these employees by permitting them to take off at another time a number of hours equal to the overtime hours worked (i.e., "compensatory" time). In this manner, if an employee works 45½ hours in one week, he is paid for 35½ hours, but may be permitted to take off 10 hours in another pay period when, although he works only 25½ hours, he is paid for the full 35½ hours. Such compensatory time may be distributed among two or more pay periods.

In most cases where compensatory time is accumulated, the employees are required to work overtime hours be-

cause of seasonal work or other temporary reasons which may extend over several weeks. They do not, therefore, necessarily receive compensatory time off during the same pay period, but may receive it months later. This is particularly common with laborers and employees of the State Roads Commission but is not limited to such personnel. If the Fair Labor Standards Act, as amended by Public Law 89-601, were effective, therefore, the State, in these instances, would not be able effectively to utilize the device of compensatory time to offset overtime hours worked.

In such cases, the employees' work load cannot be spread evenly over the year. More than half of their total yearly hours may be required in a particular six-month period, and less than half of their total yearly hours are needed in the other six-month period. In these instances, the State by permitting the employees to utilize their compensatory time in the slack period, pays straight time for the full number of hours, but can adjust the weekly hours to the work schedule. If the Fair Labor Standards Act, as amended by Public Law 89-601, is effective, however, the State, by being unable to utilize the compensatory time approach, would be required to pay the premium rate (150% of normal hourly wage) for the overtime hours during the peak period, and also be required by the Standard Salary Plan under State law to pay the full straight time weekly salary even though less than a full week of work is actually performed or is actually needed.

III.

Public School System

1. *Article VIII* of the Constitution of Maryland required the General Assembly at its first session after the adoption of the Constitution to establish throughout the State a thorough and efficient system of free public schools, and to provide for the maintenance by taxation or otherwise.

2. *Article 77* of the Annotated Code of Maryland creates a local board of education in each of the twenty-three

counties of the State, and a board of school commissioners in Baltimore City. Subject to the supervision exercised by the State Board of Education and the State Superintendent of Schools, as provided in said Article 77, the management and control of the public school system is vested in the said local boards.

3. *Article 77, Section 68,* requires each county of Maryland and Baltimore City to levy a minimum tax for the maintenance and support of its school system. Section 220 of Article 77 requires the State to appropriate an additional amount in accordance with a formula set forth therein. In accordance with these laws, the State provides from general tax revenues approximately 50% of the entire school expenditures.

4. The State of Maryland also has four State training schools and administers and supervises four forestry camps for delinquent boys. The State opened in 1959 and operates the Maryland Children's Center, which is a facility for short-term detention and study of boys judged delinquent by the courts, and in 1963 opened and now operates the Thomas J. S. Waxter Children's Center, a forty-bed detention and study facility for boys and girls. The training schools and their population are as follows:

	Population
Boys Village of Maryland	200
Victor Cullen School	170
Maryland Training School for Boys	440
Montrose School for Girls	268

In all of these institutions, many more children spend some time at the institution during the course of the year than the average actual detained population figures.

The four forestry camps accommodate approximately 120 boys.

5. The total school population in Maryland as of September 30, 1965 (from nursery school through Grade 12) was 911,654. The breakdown as to public and non-public school population was as follows:

	Population	% of Total
Nursery School (private)	4,659	.52
Kindergarten	41,034	4.52
Public 32,730		
Private 8,304		
Catholic Schools (including kindergarten and nursey)	115,616	12.69
Campus Schools	939	.02
Other Religiously Affiliated Non-Public Schools (excluding kindergarten and nursery)	8,433	.94
Other Non-Public Schools not religiously affiliated)	9,432	1.05
Public School (excluding kindergarten and nursery)	730,074	80.09
State Institutions	1,467	.17
Total	911,654	100.00

The State of Maryland does not provide free public kindergartens, although Baltimore City and Montgomery County have a system of such kindergartens. The public kindergarten figure represents the children attending kindergarten in those two subdivisions plus the kindergarten population of 168 in the campus laboratory schools operated by the State Colleges. The State does not operate public nursery schools, so that the figure for nursery schools is entirely that of non-public nursery schools.

Thus, of a total of 865, 961 children enrolled in Grades 1-12, 856, 529, or 98%, are enrolled in public or religiously-affiliated non-public schools. Less than 2% are enrolled in schools operated for commercial purposes.

6. There are no private institutions in Maryland which provide the same types of facilities for children as are provided by the training schools and the forestry camps described in Paragraph 4 above.

7. The estimated expenditures for the public school system in Maryland for 1966-67 is $440,950,000.00. In addition, further expenditures of $99,000,000.00 for capital improvements and $23,000,000.00 for interest on the school debt are anticipated. For the year 1963-64 (which is agreed to be representative of later years), 93.3% of the total revenue used for public school purposes came from State and local funds. Another 6% came from federal funds.

8. The State of Maryland receives certain funds from the federal government in order to be able to loan books and other instructional laboratory materials to non-public schools. In the latest fiscal year $385,371.00 was expended in federal funds for the purchase of materials requested by these schools. The materials remain the property of the State Department of Education, and all materials are so labeled before shipment to the requesting schools.

9. The Board of Trustees of the State Colleges operates five State Colleges in Maryland. As of October 1, 1966, their enrollment was as follows:

	Total Enrollment	*Out-of-State Students*
Bowie State College	505	74
Coppin State College	590	3
Frostburg State College	1,687	34
Salisbury State College	660	59
Towson State College	3,813	60
Total	7,255	230

IV.

State Publicly Owned and Operated Hospital Facilities

1. The State Board of Health and Mental Hygiene is responsible for the health interests of the State and the provision of adequate health services and medical care in accordance with such interests. It has jurisdiction over and is the policy making authority for the State Department of Health and the State Department of Mental Hygiene. These two departments function as the technical arm for

the line units of the Board. One of the functions of the State Department of Health is to operate three chronic disease hospitals and two tuberculosis hospitals.

2. The three chronic disease hospitals are:

Montebello State Hospital
Deer's Head State Hospital
Western Maryland State Hospital

These institutions were created by Article 43, Sections 598 *et seq.* of the Annotated Code of Maryland. Section 599 of Article 43 dealing with the admission of patients to the chronic disease hospitals, provides:

> "Patients may be admitted who can pay part or all of the costs of their care only when the special facilities required by their conditions are not otherwise obtainable elsewhere in Maryland."

The total beds in the chronic disease hospitals are as follows:

	Beds
Montebello	392
Deer's Head	284
Western Maryland	298
	974
Baltimore City Hospital	713
Total	1,687

3. In addition to the public chronic disease hospitals, there are in Maryland three hospitals which specialize in the treatment of pediatric problems. They are:

	Beds
Children's Hospital	150
Happy Hills Convalescent Home	62
James Lawrence Kernan Hospital for Crippled Children	114
Total	326

The only other institutions which can be classified as chronic disease hospitals are:

	Beds
Home for the Incurables of Maryland	205
Levindale Hebrew Home and Infirmary	263
Total	468

Pursuant to the directive of Section 599 of Article 43, none of the non-public facilities which may be classed as chronic disease hospitals can provide the special facilities required by the patients at the public chronic disease hospitals.

4. The two tuberculosis hospitals operated by the State Department of Health are the Mount Wilson State Hospital with 500 beds, and Pine Bluff State Hospital with 65 beds.

The only other institutions having tubercular beds in the State are Baltimore City Hospital which has 302 beds, and Springfield State Hospital which cares for those mental patients who may have tuberculosis.

A total of 867 beds, all publicly owned and operated, constitutes the total provision for tubercular care in the State of Maryland. There are no non-public hospitals having beds especially for tubercular patients.

5. The Department of Mental Hygiene operates four hospitals for the mentally ill or emotionally disturbed, which are as follows:

	Beds
Springfield State Hospital	3,150
Spring Grove State Hospital	2,282
Crownsville State Hospital	1,953
Eastern Shore State Hospital	630
Total	8,015

The Department of Mental Hygiene also operates the Clifton T. Perkins State Hospital, which is a maximum security mental institution, designated as the institution

for the criminally insane. It has 300 beds. In addition, the Department of Mental Hygiene operates two hospitals for the mentally retarded, namely:

	Beds
Rosewood State Hospital	2,592
Henryton State Hospital	403
Total	2,995

5. There are two mental institutions in the State of Maryland affiliated with religious organizations, the Seton Institute with 300 beds and Brook Lane Psychiatric Center with 40 beds. There are six other institutions which are classed as mental hospitals, operated by non-public and non-religious organizations. They are as follows:

	Beds
Gundry Sanitarium	33
Johns Hopkins Hospital	82
Sylvan Retreat	90
Sheppard Pratt	265
Taylor Manor	101
Chestnut Lodge, Inc.	90
Total	661

The number of patients in these non-public, non-religiously affiliated institutions, assuming but not agreeing that said institutions are similar in function to those operated by the State of Maryland, represents 5.3% of the total hospitalized mental patients in the State.

V.

Selected In-State and Out-of-State Purchases by State Hospitals and Local School Systems

1. For the fiscal year ended June 30, 1966, the Maryland State Department of Health made purchases as follows for Deer's Head State Hospital, Montebello State Hospital.

Western Maryland State Hospital, Mount Wilson State Hospital, and Pine Bluff State Hospital:

	Total Expenditures	*In Maryland*	*Out of Maryland*
Drugs & Medicines	$142,159	$ 73,562	$68,597
X-Ray Supplies	16,804	16,183	621
X-Ray Equipment	263	263	—
Hospital Beds	12,732	12,732	—
Total of Items	$171,958	$102,740	$69,218

It is agreed that an undetermined portion of the items shown as purchased "In Maryland" may have been produced in other states.

2. For the fiscal year ended June 30, 1966, the Maryland State Department of Mental Hygiene made purchases as follows for Crownsville State Hospital, Eastern Shore State Hospital, Henryton State Hospital, Clifton T. Perkins State Hospital, Rosewood State Hospital Institute for Children, Spring Grove State Hospital, and Springfield State Hospital:

	Total Expenditures	*In Maryland*	*Out of Maryland*
Hospital Beds	$ 42,724		
X-Ray Supplies	27,659		
X-Ray Equipment	13,512		
Medicines, Drugs and Chemicals	211,888		
Special Drugs	468,870		
Medical and Surgical Supplies	110,808		
Total of Items	$875,461		

It has not been possible to determine what proportion of the above represent Maryland purchases and out-of-state purchases. However, the following general statements can be made:

(a) The total expenditures for special drugs represent the cost of tranquilizers and special psychiatric drugs, all of which are purchased directly from manufacturing firms located outside of Maryland.

(b) The expenditures for medicines, drugs and chemicals are, for the most part, for purchases of drugs and medicines through Maryland distributors, but the firms manufacturing these products are, for the most part, located outside the State.

(c) With reference to the purchase of hospital beds, many of these are purchased from State Use Industries, but any specialized beds, such as crib beds, etc., are purchased from manufacturers outside of Maryland.

(d) It is agreed that an undetermined portion of X-Ray supplies and equipment, and medical and surgical supplies, even though purchased in Maryland, may have been produced outside the State.

3. For the fiscal year ended June 30, 1966, the University of Maryland made purchases as follows with respect to the University Hospital:

	Total Expenditures	*In Maryland*	*Out of Maryland*
Drugs & Medicines	$398,329	$151,458	$246,871
X-Ray Equipment	3,430	—	3,430
Hospital Beds	2,937	—	2,937
Total of Items ..	$404,696	$151,458	$253,238

It is agreed that an undetermined portion of the items shown as purchased "In Maryland" may have been produced in other states.

4. For the fiscal year ended June 30, 1966, the local public school systems of Maryland made purchases as follows:

	Total Expenditures	*In Maryland*	*Out of Maryland*
Textbooks	$4,619,356.76	$ 21,913.39	$4,597,443.37
Furniture	3,290,830.81	940,644.60	2,350,186.21
Lockers	240,739.50	21,706.05	219,033.45
Total of Items	$8,150,927.07	$984,264.04	$7,166,663.03

5. The materials, supplies and equipment purchased by the State hospitals, the University Hospital and the local school systems are purchased for use and consumption by said agencies in the performance of their functions. Certain items, such as books used in the schools, are made available to students on a temporary basis and without charge, unless lost or destroyed. Other items, such as lockers, chairs and desks, remain in the possession of, and on the premises of, the school but are assigned to the students temporarily. Still others, such as visual aids, are neither delivered nor assigned to individual students but are operated by school employees for the benefit of students as a group. Materials, supplies and equipment purchased and used by the hospitals in relation to their patients are similarly handled except with respect to drugs, medicines and foods administered to the patients, generally without charge, and not returned. At the University Hospital charges are made to paying patients.

VI.

Selected Expenditures of Other State Offices

1. For the fiscal year ended June 30, 1966, the Office of the Governor of the State of Maryland had out-of-state expenditures for equipment, supplies, and gas and oil totaling $8,744.27.

2. For the current fiscal year commencing July 1, 1966, the Court of Appeals of Maryland and the Court of Special Appeals of Maryland has expended $31,496.00 for equipment, law books, and contractual services from sources outside of the State of Maryland.

3. For the current fiscal year commencing July 1, 1966, the Secretary of State of Maryland has had total expenditures for printing of $8,960.00, of which $7,750.90 were expenditures outside the State of Maryland.

4. There are twenty-three (23) counties in the State of Maryland and each county has a circuit court. The functions of the circuit court of the county are carried on in Baltimore City by the Supreme Bench of Baltimore. For the fiscal year ended June 30, 1966, the Clerk of the Circuit Court for Baltimore County purchased $1,878.69 of office supplies; $83,862.50 of dockets, stationery and printing; and $6,060.70 of equipment. Such purchases were made from Maryland distributors, but an undetermined portion of said items, came from out-of-state producers. The dockets, which make up the largest item of expenditure, were furnished by the Paul Company, which is a local representative of the Cott Index System. The Cott Index System has its main office in Columbus, Ohio. In Montgomery County, the Circuit Court purchased its docket supplies from the Russell Index System in Reading, Pennsylvania.

5. For the fiscal year ended June 30, 1966, the Maryland State Police expended $135,766.00 for the purchase of apparel. Of this amount, $14,710.00 was purchased from suppliers outside of Maryland, and of the balance, purchased from suppliers in Maryland, some portion of the apparel was manufactured outside of Maryland. For the calendar year ended December 31, 1965, the Baltimore City Police Department, an agency of the State of Maryland, expended $411,154.00 for motor vehicles and $2,644.00 for weapons, some portion of which were manufactured outside of Maryland.

6. For the fiscal year ended June 30, 1966, the Office of the Attorney General of Maryland expended $13,033.65 for automobiles, books, equipment, and stationery. Of this amount, $3,289.98 was expended for purchases made outside of Maryland, and, of the balance, some portion of such items were manufactured outside of Maryland.

VII.

Financial Burden On the State of Maryland If P.L. 89-601 Is Valid

1. For the period of February 1, 1967-June 30, 1967, the local public school systems of Maryland would be required to expend $923,988 in overtime pay which would not have to be paid if P.L. 89-601 were not in effect. For the period of September 1, 1967, to January 31, 1968, an additional sum of $923,988 is expected to be expended for overtime pay which would not have to be paid if P.L. 89-601 were not in effect, making a total for the ten months of school operation of $1,847,976.

2. For the fiscal year ending June 30, 1967, the State of Maryland would be required to expend $438,800 in overtime pay to directly affected employees which would not have to be paid if P.L. 89-601 were not in effect. The agencies involved in this additional expense (by whom the affected personnel are employed) are The Department of Mental Hygiene, the Department of Health, Patuxent Institution, Bowie State College, Coppin State College, Towson State College, Frostburg State College, Salisbury State College, Morgan State College, St. Mary's College, School for the Deaf, the Maryland Training School, Montrose Training School, Victor Cullen School, Thomas J. S. Waxter Children's Center, Maryland Children's Center, Esther Loring Richards Children's Center, Jacob E. Finesinger Children's Center.

3. The State is required under its merit system law, referred to above in Stipulation II to pay comparable salaries for all positions involving comparable duties, experience, responsibility, and authority. It would therefore be necessary to pay other employees not directly covered by the Fair Labor Standards Act but performing similar duties the same rate of overtime pay for all hours worked in excess of the federally-established maximum. In order to comply with both P.L. 89-601 and the applicable State laws, the State would be required to expend $1,884,800 in overtime pay to its employees for the fiscal

year ending June 30, 1967, which would not have to be paid if P.L. 89-601 were not in effect.

4. Based upon a 44-hour week, the University of Maryland would be required to expend annually $170,000.00 to cover additional overtime pay to directly affected employee, and additional costs for record keeping, computation and auditing, which sum would not have to be paid if P.L. 89-601 were not in effect.

* * * * * *

IX.

Extended Effect of Public Law 89-601 on University of Maryland

1. The University of Maryland is the State university and land grant institution of Maryland. It is also a department of the State government, under the executive branch. Maryland Code (1957) Art. 41, Secs. 2 and 201. The Board of Regents, whose members are appointed by the Governor, is the governing body of the University, having powers provided by law. There are approximately 12,000 employees and 42,000 students at the University at the present time. The employees are paid out of the treasury of the State of Maryland.

2. The University of Maryland presently operates 4 major campuses in the State of Maryland located at College Park, Baltimore, Catonsville, and Princess Anne. The major administrative divisions of the University are as follows:

College of Agriculture
College of Arts and Sciences
College of Business and Public Administration
College of Education
College of Engineering, the Glenn L. Martin Institute of Technology
Agricultural and Home Economics Extension Service
Agricultural Services and Controls
School of Dentistry
School of Law
School of Medicine
College of Home Economics

Department of Air Science
College of Physical Education, Recreation and Health
University College
Graduate School
Summer School
Agricultural Experiment Station
Computer Science Center
Natural Resources Institute
School of Nursing
School of Pharmacy
School of Social Work
University Hospital

3. The basic functions of the University are teaching, research and services. Its role in the government of the State of Maryland is to provide at a minimum cost maximum opportunities for higher education, including undergraduate, postgraduate, professional and adult education. It provides for research in agriculture, the sciences, engineering, education, medicine, air and water pollution, and in other fields. The University further provides a number of extension services to the community in Maryland related generally to its educational and research missions, and its University College Division offers educational programs to U. S. military and civilian personnel and their dependents under contract with the U. S. Government in military installations overseas. The overseas program is entirely self-supported from funds received from student tuition and logistical support from the U. S. Government. No State funds are involved. The European division maintains a central office in Heidelberg, Germany, serving installations in several European countries. The Far East division is located in Fuchu, Japan, and serves military installations in several Asian countries.

4. The University, in connection with its medical school, operates University Hospital, all of the employees of which are employees of the University. The University Hospital has an average daily census of 514 in-patients. There were 721 average daily visits to the out-patient department and emergency room in fiscal year 1966.

5. The work-week for administrative and clerical personnel is 36¼ hours, with compensatory time only allowed up to forty (40) hours. Beyond 40 hours the employee is

paid overtime at the basic hourly rate only where funds are available, or is given additional compensatory time. Compensatory time must be taken within 30 days of the time it is accumulated, unless permission is granted to take such time at a later date. Many employees are able to take accumulated compensatory time at Christmas and other holiday seasons. Physical plant personnel, laboratory and research technicians, and hospital employees are on a 40 hour week, with the same provisions for compensatory time or straight time overtime payments described above.

6. The physical plant services affected by the Act are primarily services such as snow removal, traffic control, unusual maintenance problems, and policing special events such as lectures, meetings, music, theatre, class programs and athletic events. Such events generally occur on weekends or in the evening.

7. In the event additional funds should not be made available from State, Federal or other sources to pay the additional cost as hereinabove set forth, P.L. 89-601 may have the following impact upon the University:

(a) Some research projects may have to be abandoned because the additional cost involved in payment of overtime cannot be made up from the contract funds by reductions in personnel or other expenditures.

(b) Some research projects, if required to be put on a limited work week basis (e.g., 40-hour week), would take longer to complete or achieve significant results. However, most research contracts are funded on an annual basis and results are expected to be achieved within the year.

(c) Award of advanced degrees to graduate research assistants working on research projects which have been delayed or abandoned would also be delayed or made impossible.

(d) Some activities requiring physical plant personnel, such as those hereinabove described, community services and hospital services may have to be curtailed.

* * * * * *

STIPULATION

It is agreed and stipulated by and between the State of Ohio as an Intervening Party Plaintiff, and W. Willard Wirtz, Secretary of Labor, et al. as Defendants that the hereinafter set forth statements of facts and exhibits attached hereto may be accepted by the United States District Court for the District of Maryland as true and correct, and may be received as evidence in the above styled case subject, however, to the right of either party to object on grounds of relevancy and materiality. * * *

* * * * * *

(D) Estimated Additional Costs to Comply with Fair Labor Standards Act.

For the fiscal year ending June 30, 1967, Ohio State University which is the largest of all state supported universities in the State of Ohio would be required to expend, under the provisions of the Fair Labor Standards Act as amended by P. L. 89-106, effective February 1, 1967, at least an additional $360,000 for overtime pay to covered employees based on a sampling of six pay periods in fiscal 1966 covering 1,068 individuals.

Further, for the fiscal year ending June 30, 1967, Ohio State University Hospital would be required to expend under the provisions of the Fair Labor Standards Act as amended by P. L. 89-106, effective February 1, 1967, at least an additional $72,000 for overtime pay to covered employees based on a sampling of six pay periods in fiscal 1966. (See Exhibit 6, which is attached hereto.)

* * * * * *

* * * The materials, supplies, and equipment purchased by the State hospitals, the University Hospital, and the local school systems are purchased for use and consumption by said agencies in the performance of their functions. Certain items such as books used in the schools are made available to students on a temporary basis and without charge, unless lost or destroyed. Other items such as locker, chairs and desks remain in the possession of, and

on the premises of, the school but are assigned to the students temporarily. Still others such as visual aids are neither delivered nor assigned to individual students but are operated by school employees for the benefit of students as a group. Materials, supplies and equipment purchased and used by the hospitals in relation to their patients are similarly handled except with respect to drugs, medicines and foods administered to the patients, generally without charge, and not returned. * * *

* * * * * *

STIPULATION BETWEEN STATE OF TEXAS AND DEFENDANTS

It is agreed and stipulated by and between the State of Texas, one of the Plaintiffs herein, and W. Willard Wirtz, et al., as Defendants, that, reserving to each party objections on grounds of relevancy and materiality, the hereinafter listed basic facts would be testified to by the various persons named below, having knowledge thereof, if they were present and placed under oath before this Court and that all or any part of the Stipulation may be introduced without objection in the trial of the captioned case. It is further agreed and stipulated that the Defendants herein do not accept or agree to or consent that they or the Court shall be bound by the inferences, opinions and conclusions herein expressed or by any statements of ultimate fact (e.g. that compliance with the overtime provisions of the Act will increase costs by any specific amount per year) which are not supported by basic facts (e.g. numbers of employees, working schedules, rates of pay and a description of the method of computation). It is further stipulated that the inclusion of information concerning the operation of any of the agencies of political subdivisions of the State of Texas hereinafter mentioned is not admission that such agency or political subdivision is, in fact, subject to regulation under the provisions of the Fair Labor Standards Act, as amended by Public Law 89-601:

I.

The Board of Control. William J. Burke, Executive Director of the Board of Control and Sam G. Cook, Chief of

the Purchasing Division of the Board of Control, if placed under oath would testify as follows concerning the operation of said agency.

A. Organization. The Board of Control was established under the provisions of Article 664-3, Vernon's Annotated Civil Statutes of Texas, commonly known as the State Purchasing Act of 1957, a copy of which is attached hereto as Exhibit 1.

B. Duties. The Board of Control is required by law to handle those purchases for which the Legislature makes appropriations to the respective Agencies. The purchases are made on the basis of requisitions submitted to the Board of Control by the various State Agencies at the time the need for any given commodity arises.

C. Particular Types of Purchases. 1. Purchases for the Texas Education Agency: The Board of Control does not purchase textbooks for the Texas Education Agency for use in the Public Schools of Texas. The Textbook Commission is given this particular right by statute. The Board of Control does, however, purchase school buses.

2. The School Districts of the State receive assistance from the State for the transport of children to and from their homes. They are allowed so much per pupil per year for the transport service. The statute provides that the Board of Control will buy for the School District receiving such school aid, school buses, tires and tools. The law requires that our Agency make purchases on the basis of competitive bids and if all things are equal, then the award be given to a Texas concern. This does not mean a Texas manufacturer — this means a company submitting a bid must be a Texas company. This practice is followed in connection with school buses as well as other items. To our knowledge, we have not had a bid for a school bus or buses offered from a distributor or company from outside of the State. Our Agency in placing bids gives the specifications for the type body, the interior equipment, the size motor and other details necessary for the distributor or agency desiring the bid to have the full information as to the type bus that we require. The chassis for these buses

are usually manufactured outside of the State. Some automobile companies have assembling plants within the State, although the parts are manufactured elsewhere. There is only one company in the State that manufactures bus bodies, and we do not believe that they are manufacturing school bus bodies at this time. We would assume that these bodies are now all being made outside of the State of Texas. However, our contract is with the dealer who is located in the State and is for a complete school bus without regard as to the origin of the body or the chassis. We do not make any direct contract with the manufacturer or either the body or the chassis. When we find that an out of state company is going to supply the body on a particular contract that has been let by us, we would probably send an inspection team to check the bodies in the process of manufacturing to see that they are complying with our specifications. This occurs after the sale has already been made by the local representative or dealer. The School District does not make any type of contract with the plant itself. The School District pays the Board of Control for the exact cost of the bus and the Board of Control, in turn, pays the person who receives the contract. We do not add anything to the purchase price to cover our cost of handling or our overhead, as this is all paid by the State of Texas. In some instances, we purchase batteries for a School District if the School District wants to get them in accordance with agreement that we may have with the company selling batteries to us for the State. This is merely an accommodation service and it is not required by statute. All of the batteries purchased in Texas for the past several years have been purchased from a San Antonio firm, the Reliable Battery Company, who manufactures their own batteries. In regard to automobile tires, tires are furnished to the State through the tire manufacturers who have distributors established in Texas. A part of the bid invitation requires a statement on the part of the tire manufacturer from the point in Texas from which the tire will be shipped. The contracts are usually made with the local distributor such as Littleton Tire Company in San Antonio or Jodie Jackson in Austin or Kelly Springfield, who manufactures tires in Tyler. Goodyear or other tires are all shipped into Texas

or manufactured in some plant in Texas for these people. We are dealing with people in Texas who represent or serve as distributors for those firms. Again these are private individuals who own their own businesses and are serving as distributors. The State purchases about $1,200,000 worth of tires a year and approximately $200,000 of this amount is purchased for School Districts. Of the total amount of tires purchased, about $750,000 are Armstrong tires, about $350,000 are Kelly Springfield tires. The Armstrong plant is located in Mississippi. Again, we might say that we do not deal directly with the manufacturer. The biggest user of these tires is the Highway Department, then the Parks and Wildlife Division and the Department of Public Safety would be the next largest users. We do not purchase any other supplies for School Districts.

3. Food Purchases: Our Agency purchases food for all of our State Hospitals and all other Texas institutions that have people in either care or custody, except what portion of food that the Prison System might produce for its own use. All of our purchases are made from local wholesale grocery houses. Of course, a lot of these products come from outside of the State and a large amount particularly of canned vegetables originate from packing plants inside of the State of Texas. When we place an order, we do not require that the wholesale grocer list the point of origin of the product supplied. We specify the products that we want, the size cans, and such similar data, and the wholesaler supplies those that he has on hand or those he can obtain in order to meet the bid. We keep no record of what percentage are actually canned in Texas, as this would be an insurmountable problem. Likewise, we contract for all of the meats used. The meats come from Texas producers. The packing houses such as Swift, Wilson and others have Texas operations. We do not know of any meat delivered to Texas institutions that would not have been produced in the State of Texas. In other words, we do not feed the real expensive type meat that might be shipped in from out of state. We also contract for staples on a quarterly basis from wholesale grocers, and while we believe a good percentage of these items are produced in

Texas, we cannot dictate the origin of the material. Purchases of detergents, brooms, mops, and other cleaning materials are now made from the Department of Corrections since the passage of Article 6203c, Vernon's Annotated Civil Statutes, which allows the Prison System of Texas to produce certain items for use by State Agencies. We control the specifications and price, and the Agencies under a catalogue arrangement order these supplies directly from the Prison System. The Agencies themselves purchase fresh vegetables and other perishables in their localities.

4. Drugs and Hospital Supplies. Perishable drugs are usually ordered by us directly from major pharmaceutical houses. Our Agency has a Drug Committee that assists in this and consists entirely of pharmacists. The various State Hospitals advise the type of drugs needed and we make contracts direct with out of state pharmaceutical houses based on a Federal or State price list purported by the manufacturer to be the lowest price available. Other drugs such as aspirin and other commodities that can be bought under their generic terms are usually handled by the San Antonio Drug Company and other Texas firms, but vitamins and specialty items come directly from the manufacturer. The major portion of our drugs, therefore, are bought from out of state houses and are shipped directly to the hospitals. On the other hand, all hospital supplies and equipment are purchased through Texas distributors. Most of these items are, however, probably manufactured outside the State of Texas. However, contact again is not made with the manufacturer, but with the local distributor. As both we and the manufacturers feel that this type of specialized equipment would need a certain amount of service, the office servicing the equipment needs to be close to its destination. Again, we are not interested in determining the origin of the manufacturer, but merely that the equipment meet certain specifications. We might say this office buys everything that is bought out of General Revenue of the State except emergency purchases that we authorize an institution to make. The Board of Control is even expected to purchase those items that are furnished under Federal grants to the State.

5. Purchases for Institutions of Higher Learning. Our purchasing procedure is the same for Institutions of Higher Learning as for other institutions. We do grant these institutions on occasions authority to purchase particular items from individuals on a negotiated basis, such as a library collection on a particular subject. We do not purchase food for dormitory use or other items maintained by the Universities for the benefit of the students. These are purchased by the Universities out of a revolving fund maintained by them.

II.

The Texas Youth Council. Dr. James A. Turman, Director of the Texas Youth Council, if placed under oath would testify as follows concerning this agency:

A. Organization: The Texas Youth Council was created under the provisions of Article 5143d, Vernon's Annotated Civil Statutes, copy of this act being attached hereto as Exhibit 2. The Youth Council consists of three members appointed by the Governor with the consent of the Senate, and the Council appoints the Executive Director. The Youth Council maintains supervision of all the State Training Schools and Parole Supervision of State wards, and it also controls and supervises the State Homes for Dependent, Neglected Children.

B. Organizational Structure of State Training Schools: The State Training Schools are institutions maintained by the State of Texas as correctional facilities for delinquent children. All children under supervision at the Training Schools have been committed to the care and custody of the Youth Council by a court order finding the child to be guilty of acts of delinquency. These institutions are commonly known and called in many areas "Reform Schools". Training Schools for girls are located at Gainesville, Texas, and at Crockett, Texas. The Training School for boys is located at Gatesville, Texas. This Training School complex consists of seven different schools. Each of these units has its own semi-autonomous structure and has a Unit Superintendent. A General Superintendent is in charge of the

seven schools. The Mountainview School for Boys is also located near Gatesville and is a security-type institution.

C. School Provisions: The institutions maintained for Dependent, Neglected Children contract with the local School District in that area for the children in that particular institution to attend the local schools. The schools are not operated or maintained by the institution. In the case of the Training Schools, however, each Training School consists of an Independent School District, co-extensive with the State property owned in connection with the Training School. The Board of the Youth Council serves as the School Board for each of these School Districts. Of course, no taxes are levied and all funds expended are provided by the State of Texas through appropriations by the State Legislature. These schools are fully accredited through high school level by the Texas Education Agency and receive the same grants and aids through the Texas Education Agency as do other Public Schools in Texas. The students at these schools are composed entirely of those children committed to our custody and care for delinquent acts. Children of our employees who live on the premises are sent to Public Schools in their respective counties and are not allowed to attend classes with the children which are the responsibility of the Youth Council. Most of these children when assigned to the Youth Council are two or more years behind their age group if enrolled in a normal School District. It is the policy of the Youth Council to require the child to attend academic school for eleven months of the year. In addition, courses in vocational training are given for those old enough to participate in and profit by it. This is in addition to the academic school work. Twice a year the institutions have formal commencement, graduation exercises.

D. Operational Procedure: In addition to academic and vocational training, as a part of the rehabilitation program every child has required work to do. These tasks include makng his bed and taking care of the cleaning of the dormitory, and the maintaining and keeping of the grounds. In addition to this, each institution has a recreation program usually in the latter part of the day. There is some form

of recreational program every day. All in all, the child's time is occupied approximately all of his waking hours. We feel that this program is necessary for the rehabilitation of the child. We must bear in mind that each of these children was a 100% failure when committed to the care and custody of the Youth Council. The family, the school, the community, the church and the court had failed to help any of them to any extent at the time they were committed. There was obviously nothing in their community that could meet the needs of these children, and the Court had no alternative but to send them to the Youth Council. After a period in the Supervised Parole, approximately 24% of these children come back a second time and only 3.9% of the people now entering the penitentiary have ever been in the State Training School. When the child is placed on parole, he is returned to his own community under supervision. More than 50% of these children return to the Public Schools and continue their education. The parole officer is located in the area where the child is living. While in their respective institutions, however, the children are under close supervision and are kept under control and surveillance 24 hours a day. They are not free to come and go as they please. Most children are assigned to a dormitory-type facility having thirty boys to a dormitory. They make their own beds, sweep the floor, keep the building where they live and after school they take care of the grounds around the area. Some of them work on KP duty. KP duty is rotated and is considered a vocational training program. Many of these children have never been able to get or hold a job. Trained instructors advise those in the KP program on proper methods of work in this area so that they may get a job later in some public establishment. In Mountainview School particularly, some of these boys are trained as chefs and have gotten jobs as cooks in hotels and restaurants after being released. In addition to rehabilitating the child, the work performed by the child keeps the institution functioning. The program is very much like that found in the Army. Without their services in cleaning the barracks and grounds, it would be very difficult to maintain each institution. The Mountainview School is different from the other institutions only in that it is a security-type

institution. It has a fence around it. The program inside it is the same. The children assigned to Mountainview, however, are chronic, serious offenders. Every one of these children have committed what would have been, almost without exception, a capital offense had they been old enough to be charged as an adult. These are such offenses as murder, armed robbery, rape and other serious offenses to our society. Under this program, these children have adopted to the return to society even better than those in the open-type institution — possibly because the average length of stay is twenty-seven months in this institution as against an average length of stay of approximately ten months in others. They are given more training and have a longer period of controlled treatment through the use of counselors, psychiatrists, psychologists, as well as teachers. Most of them are old enough to understand that if they get into serious trouble again, they can possibly be prosecuted as an adult. In regard to the work program, it is the feeling of the Youth Council that these children must have tasks assigned to them because there is dignity in work. Many of these children have never known this, nor have they had the opportunity to learn this fact. Many of them have come from welfare families where they have lived entirely on the welfare check and where none of the adults in the home have worked or wanted to work because they found it easier to take the welfare path of least resistance. The Youth Council finds that for the first time many of these children learn that there is dignity in work and even pleasure and accomplishment in work; and that they can do something themselves with their own hands. We therefore feel that a work program is absolutely indispensable in any type of rehabilitation program for delinquent children — just as essential as religious training, moral training, or any other training that we might give them. Without this program, we do not feel that they could go back into the community and adjust satisfactorily. Many of the work jobs are also vocational training. There is one firm in Waco that will take every child who completes the janitorial program; the firm keeps public buildings on a contract basis.

E. Building Program. Two years ago the Legislature authorized a 244 unit at the Gatesville School. This was the last building project. Another project will be started approximately two years from this date. Buildings are built entirely on a contract basis with general contractors and none of our people assist. The 244 unit project mentioned above costs approximately $500,000 and consists of one school building and three dormitories. We had nothing to do with the purchase of the material— this is all done by the general contractor.

F. Purchases. The Board of Control buys all supplies for our institutions except perishables; these are bought locally. The other items are bought on a contract basis by the Board of Control. Some few items are bought by us locally on an emergency basis. The Board of Control also buys all desks, all office supplies and all stationary that might be needed. Textbooks are furnished by the Texas Education Agency just as they are furnished Public Schools.

G. Many of our people such as those supervising dormitories and performing similar tasks work a large amount of overtime. All of our employees are paid over $1.00 an hour. In fact, the lowest paid employee receives in excess of $1.75 an hour. Our average hourly rate is $1.88 per hour for all employees. This is based on the fact that the majority of our employees are in Group 6, Step one, and receive an annual salary of $3912.00. A few make less and a few make more. Our people are now putting in an average of 13,351 hours of overtime per week based on our 40 hour week, in compliance with the State laws. These figures are based on 717 employees being possibly subject to the Act out of a total number of 1300 employees. We give compensatory time off when we can find time and not affect the efficiency of the program. We do not feel that we could get by on less personnel than we have now because of security and training problems. To pay these people for overtime would cost $1,957,889.34 per annum (694,287 total hours). To eliminate overtime, 359 additional full-time employees would be needed at a cost of $1,404,408.00. While this would be cheaper, it would be almost impossible to find this additional personnel. Should

we likewise have to pay the children for the tasks they perform in connection with their training, we would have a cost of over $1,100,000 additionally. This figure is based on payment of $1.00 per hour with each inmate working approximately 4.25 hours a day, six days a week, less $24.00 per week for room and food. (It is agreed and stipulated, however, as to the work activities of the inmates as hereinbefore described, the Government does not contend that an employer-employee relationship exists or that the Fair Labor Standards Act applies to the children who participate in the work program.)

H. There are no existing private institutions that could maintain these children should the State operated institutions be forced to close.

I. We, the Texas Youth Council, as thus organized and functioning, use and consume all supplies purchased and does not resell any of these.

III.

Department of Health. Dr. Robert B. Skinner, M.D., Director of the Texas State Tubercular Hospitals, Frank E. Hagl, Director of Personnel, and Martin T. Love, Administrative Assistant, General Services Section, if present and under oath would testify as follows:

A. Organization. Under the authority of Article 4477-12, State Tubercular Hospitals were placed under the authority of the State Board of Health in 1965 and operated in accordance with that statute and Article 4477-11, Vernon's Texas Civil Statutes, also known as the Texas Tuberculosis Code. Hospitals are located at Tyler, Harlingen, San Antonio, and at Carlsbad, Texas, which is near San Angelo. There are no private tubercular hospitals in the State of Texas other than those mentioned in Paragraph G, p. 15 but private hospitals have isolation wards, where tuberculars may be held pending transfer to the State Hospital System. (Exhibits No. 3 and 4).

B. Under the authority of Article 4477-11, V.T.C.S., persons affected with tuberculosis can be committed to

State Hospitals and placed under quarantine to prevent the spread of this disease to other persons. The provision is made for a court order requiring such a commitment. Patients admitted to State Hospitals are those who are completely indigent and unable to pay any portion of the costs of the hospitalization and those who are able to pay all or a part of the hospital charges. By law, the hospitals are required to charge only exact costs of the services rendered, including the medicines furnished. If a person is not able to pay the entire cost of hospitalization, he pays such portion as he may be able, or the State may attempt to recover some portion of the charge from his estate or from anyone legally responsible for his care. Each of the four hospitals has slightly different charges per day. These charges run from $12.00 to $15.00 per day, depending on the hospital. This figure includes all medicines furnished, food, nursing care, physicians' services, X-rays, and other expenses. Only nine persons paid their full cost of hospitalization of approximately 2900 admissions last year. The great majority paid none of their costs; in fact, practically all of the patients were in this category.

C. Supplies for the hospitals are purchased by the State Board of Control. These purchases are made on bids after we inform the Board of Control what drugs we need. In the event a new drug appears on the market that personnel in the hospital wish to test in the treatment of tuberculosis, specifications are written, sent to the Board of Control, and it would be up to this organization to determine from the bids which particular pharmaceutical house had submitted the low bid. Drugs are charged at actual cost — that is to those patients from whom any money may be collected. No sum is added on by the hospital for administration or overhead, nor are patients charged more for the drugs administered to them because of the inability of other patients to pay for those used. It is the actual costs of these drugs as determined by the bid from the pharmaceutical house that determine our daily charge to the patients. In addition to drugs, the Board of Control buys all medical supplies, furniture, equipment, and even the food served, except perishable items which are bought locally. Meat,

however, is purchased by the Board of Control. All perishables come from Texas. It is unknown where the Board of Control purchases the other items.

D. A commissary or canteen is maintained in each hospital where patients may purchase various incidentals. There canteens are, however, not managed by the Hospital Board, but are managed by the Commission for the Blind and are operated by some blind person who operates the commissary as his own business and receives the profit therefrom. The hospital merely furnishes quarters free of charge as a service to its patients and in cooperation with the Commission for the Blind. The employees working in this canteen are the employees of the blind person operating it.

E. The hospital has some rehabilitation projects of a therapeutic nature where certain objects are made by the patients for sale. When any of the objects made by the patients are sold, the patient gets one-half of the sale price and the remainder is put back into the Revolving Fund to purchase new materials to be used by other patients in making other objects for sale. All patients in occupational therapy engage in this type program. This type of program is used as a therapeutic agent in the treatment of tuberculosis patients — for them to be engaged in this type of activity rather to remain in bed where they have nothing to occupy their time contributes greatly to their general welfare. The patients make hooked rugs, ash trays, various leather goods, ceramic articles and articles of this type. In the instances of patients who are not too well educated, this also constitutes vocational training and helps some of them to obtain employment when they leave the hospital.*

F. There are no employees in the hospitals making less than $1.00 an hour. Approximately 35 to 40 persons employed by the hospital, out of a total employee force of

* (It is agreed and stipulated, however, as to the work activities of the patients as hereinbefore described, the Government does not contend that an employer-employee relationship exists or that the Fair Labor Standards Act applies to the patients who participate in the work program.)

1319, at present make $1.00 an hour. A nurse on the average works 40 hours a week. Only in cases of an emergency would they be required to work overtime. This might result due to emergency or late-scheduled surgery.

G. In the event additional appropriation was not granted by the Legislature for overtime services when required, I, as Director of the Texas State Tubercular Hospitals, would empty some of the beds of the hospital in order not to be in violation of Federal regulations. Private hospitals do not keep tubercular patients; consequently, under existing conditions, patients discharged in order to comply with Wage and Hour Standards would be completely without hospital facilities. There is one exception to the above statement. A private hospital of less than 100-bed capacity exists in Dallas, but it is quite expensive and would not be available for our patients. Our State hospitals have a bed capacity of approximately 2922 beds.

H. Texas Tubercular Hospitals as thus organized and functioning use and consume all supplies and equipment purchased and do not resell any of these items.

I. Attached hereto as Exhibit 5 is the Annual Report of the Tuberculosis Control Division of the Texas State Department of Health.

IV.

If Jess M. Irwin, Jr., Executive Director of the *Texas Department of Mental Health and Mental Retardation* and Thomas E. Wood, Staff Legal Assistant, were present and under oath, they would state as follows:

A. Organization. This Department has the responsibility of control and management of the State Mental Hospitals and Special (for retarded persons) Schools.

B. As of December 31, 1966, there were 15,307 patients in the Mental Hospitals and 8,692 mentally retarded persons in the Special Schools. These institutions have more than 10,485 employees. This figure does not include the administrative and clerical personnel in the departmental headquarters.

C. All employees are now paid more than the minimum wage of $1.00 an hour, and the effect of the maximum hours of work will not work a great hardship or cause any serious problem in adjusting schedules to meet requirements. Should the work load increase or the number of employees be reduced, there would be hardship.

D. The Fair Labor Standards Act applies, by its plain wording, to the working patients and students in the hospitals and schools. There are two main categories involved: One, those whose work is incidental to training or evaluation and in a vocational rehabilitation capacity; and two, those whose work cannot be so defined. Under the statute, the first class must be paid any wage relative to productivity and there must be an exchange of certificates, having one for each patient between the institution head and the Secretary of Labor. Considering that the productivity average would be $1.00 an hour, it would cost the Department $2,077,470. per year to pay for such labor. (It is agreed by Defendants, however, that patients of the first class are not subject to wage and hour regulations under the current law.) The other class of patient-student labor (those not in the rehabilitation program) must be paid at least 50% of the minimum wage. (It is understood that the board, lodging and other facilities furnished to such patient-student labor may be credited against the wage so earned). Because of the difficulty of working with these people, it would be much more efficient to hire qualified help. It would require 255 employees to replace this student labor. At a wage of $1.20 per hour for a 40 hour week and for 50 weeks work from each employee, it would cost the State $5,402,400.00 to replace this student labor (Note: the State would pay for 52 weeks rather than 50 as stated as the employees get a 2 week vacation with pay, thus increasing costs.) The work contemplated would be used in the operation of cafeterias, laundries, mail rooms, offices and wards, doing housekeeping work and other similar labor.

If the Fair Labor Standards Act is applicable to these institutions, the vocational rehabilitation program will have

to be cancelled — a backward step in the treatment of mental illness and mental retardation. In regard to the second class, the Institution has neither the express legal authority under State law nor the funds to pay patients or students. In our opinion if the law is applicable, the programs of the hospitals and Special Schools will be sharply curtailed. Most patients do better when they are occupied. Consequently, if this practice were discontinued, the patients would suffer by reason of being deprived of this accepted and proven therapy.

E. The state law requires that this Department attempt to recover actual cost of care from each patient. The majority of our patients are unable to pay any portion of their hospital care. Some money is collected from a few persons in the Mental Institutions and some of the children in the Special Schools. Should the institution be required to pay on an hourly basis for the services performed by these patients in the second class, as described in Paragraph D, the State will be paying mental patients committed to State custody. This is not a far-fetched contention, as we run into numerous such instances in attempting to collect a portion of the costs of the care of the persons in our mental hospitals and Special Schools. Claims are made by attorneys representing their guardians or close relatives that this organization should pay the patient for the work performed by him in helping to keep his ward or working in the cafeteria, laundry, or other such facilities of the institution.

F. It is extremely difficult to obtain money needed in the field of mental health and mental retardation. Should the operational expense of these institutions suddenly increase several million dollars a year, it is our opinion that it is very doubtful that the Legislature would allocate additional funds. Although the law provides that persons becoming mentally ill or discovered to be mentally ill or insane in our correctional institutions be transferred to our State Hospitals, we have not had the bed space to take many of those that the Department of Corrections desires to turn over to us. Should the Fair Labor Standards Act be applied to our institutions, I as director, would be compelled to

discharge a number of the children in Special Schools and patients in Mental Hospitals (Insane asylums) in order not to be in violation of Federal regulations.

G. Because of the indigency of almost all of our patients, and their inability to afford private, mental care or for the families of those children in Special Schools to afford private institutions of this nature, very few if any of these persons could be admitted to another institution.

Since almost the entire cost of operating and maintaining Mental Hospitals and Special Schools comes from tax money allocated by Legislative appropriations to this Agency, and since those persons in our institutions would be unable to enter another institution, in our opinion we are in no way in competition with private industry.

H. All supplies used by our institution are purchased by the Board of Control.

I. The following mental hospitals and geriatric homes are under the administration of this department: Austin State Hospital, San Antonio State Hospital, Terrell State Hospital, Wichita Falls State Hospital, and Vernon Texas Branch, Rusk State Hospital, Big Springs State Hospital, Confederate Home for Men, Kerrville State Hospital and Legion Texas Annex. The following schools for mentally retarded children are under the direction of this department: Austin State Schools and Branch, Abilene State School, Denton State School, Mexia State School, Travis State School, Lufkin State School, and Richmond State school.

Each of the above hospitals and schools has its own superintendent and staff. Non-residents are not accepted at schools for mentally retarded children. Mental Hospitals accept persons adjudged to be insane and who may be dangerous without regard to residency, but an attempt is made to transfer an inmate of a Mental Hospital to the home state as soon as possible.

J. Attached Exhibit No. 6 reflects the monthly cost per hospital and Special School to comply with the Fair Labor Standards Act.

K. The parents or guardians of the retarded children admitted to our Special Schools are charged $252.00 for the first thirty days in the school and $144.00 per month thereafter. This represents a per diem charge of $8.40 per day for the first 30 days and $4.70 per day thereafter. This is the actual cost of the care, treatment and training of the particular child.

A very small number of parents pay for the cost of the care of their children, even at the above low rates. We receive complete payment of from only five to a maximum of ten per cent of the parents during any given month. Some parents pay a part of the costs, but approximately forty-eight per cent make no effort and pay nothing toward the cost of the child's care.

In the mental hospitals, a similar situation exists. The actual cost of keeping a person in our mental hospital is $348.00 for the first 30 days and $132.00 per month thereafter. The cost is greater during the first thirty days because of extra tests, examinations, and attention given in trying to diagnose, analyze tests and determine the best course of treatment.

A very small number of these patients pay for the cost of their care. 8 per cent on an average pay all charges and 28 per cent pay a part of the charges. The remainder pay nothing (64 per cent).

L. It is our opinion that the only solution that our Agency would have should we be subject to the Fair Labor Standards Act, in the absence of an additional appropriation, would be to close some of our Special Schools and release a large number of the inmates of our mental hospitals We depend entirely on the appropriation made by the Legislature of Texas from tax money of the State to pay our operating expenses, as the collections from our "patients" are insignificant.

M. The Mental Hospitals and Special Schools as thus organized and functioning use and consume all supplies and equipment purchased for them and do not resell any of these items.

Coordinating Board, Texas College and University System. If Dr. Jack K. Williams, Commissioner of Higher Education and Ray A. Fowler, Assistant Commissioner, were present and under oath, they would testify as follows:

A. Organization. The Coordinating Board is a State Agency created to supervise and coordinate Public Senior Colleges and Universities and to assume responsibility for the creation of Texas Public Junior College Districts and the developments of the Colleges therein. The latter duty is shared with the State Board of Vocational Education which approves new certificate programs in technical and vocational education. Article 2919e-2, Vernon's Texas Civil Statutes, known as the Higher Education Coordinating Act of 1965, attached as Exhibit 7 hereto, sets out in detail the organization and duties of this agency. The total estimated 1966 Fall head-count enrollment in Public Senior Colleges and Universities in Texas totals 183,594 students. Should these institutions be held subject to the Fair Labor Standards Act, the State will necessarily have to appropriate an additional $3,295,884.00 at the present time to comply with the terms and conditions. This does not include cost which would be charged to the students ranging from a board charge of from $36.00 per student at one institution to a room and board charge of an additional $100.00 per semester at another. The estimated cost to the State per college is attached hereto as Exhibit No. 9.

B. The Annual Report of this Agency for the fiscal year ending August 31, 1966 lists grants recommended and received by Universities in the State of Texas and also lists research projects approved by the Coordinating Board. This report is attached hereto as Exhibit No. 8.

C. All materials and supplies are purchased for Universities and Colleges by the Board of Control.

D. Junior Colleges are operated by Public Junior College Districts — each having taxing power, each electing its own Board of Trustees who have the authority to set the tax rate, fix salaries, determine courses of instruction, and provide buildings and other facilities.

E. Junior Colleges operate in the manner as Independent School Districts with the exception that free textbooks are not furnished to the students by the State, but they must purchase their own. Most Junior Colleges order the necessary books for the student, with the student paying the exact cost of the books. The State, however, does grant direct aid to each Public Junior College for the purpose of supplementing salaries of instructional personnel only and the purchase of supplies and materials for instructional purposes. This aid is conditioned on the particular Junior College meeting requirements of the Coordinating Board as to standards of instruction and curricula. Approximately $14,000 has been appropriated for this purpose for the year ending August 31, 1967. The money appropriated, however, can be used only for the limited purpose stated above.

F. Two hospital systems are under the direction of the University of Texas System. These are those relating to the Medical Branch at Galveston, Texas, and M. D. Anderson and Tumor Institute at Houston, Texas. These are teaching hospital units and, of course, operate at a loss. Less than 45% of the people received as patients at the Medical Branch at Galveston pay the total cost of their hospital services and less 40% of the patients received at the M. D. Anderson Hospital pay the total cost for services rendered to them.

G. Medicines and Supplies are purchased by the Board of Control as for other hospitals operated by the State. Approximately 18,000 patients were treated at Galveston during the past fiscal year and approximately 500 patients were treated at the M. D. Anderson Hospital.

H. A list of publications published by the University of Texas is attached hereto as Exhibit 10. Some of these publications are free and a small charge if made for others. All of these publications are printed as a public service, however, and none of them pay their own way, but must be subsidized from funds of the particular department publishing them. Records are not maintained as to what percentage of these publications may be mailed out of the State. Only a small percentage of publications are mailed

to persons outside of the State, but requests for publications are usually filled regardless of whether or not the person making the request is a resident of Texas or some other State. Publications are also exchanged with out of state universities when other universities are doing research in the same or similar fields.

I. Attached hereto as Exhibit 11 are a list of the research contracts of the University of Texas System.

VI.

Texas Education Agency. If present and under oath, Dr. J. W. Edgar, Director of the Texas Education Agency, and J. B. Golden, Director of the Textbook Division, Texas Education Agency, would testify as follows:

A. Textsbooks for Public Schools. All records of textbooks are kept in the regular course of operation of the Textbook Division of the Texas Education Agency.

Article 2866, Texas Revised Civil Statutes, requires that the State provide free textbooks to the students that attend the public schools in Texas. After each textbook has been selected and adopted, the Textbook Division then negotiates contracts with the respective agents (all of whom reside in Texas) of the publishers. The agents of the publishers make all arrangements for the publishers. Two publishers print their books in Texas, the remainder are printed outside of Texas, so far as we know. Each publisher is required by law (Article 2861, Texas Revised Civil Statutes) to establish and maintain a depository in Texas for the purpose of storing the textbooks for later distribution. Three of the larger publishers, namely Ginn and Company, D. C. Heath and Company and Houghton Mifflin Company, operate their own depository located in Dallas, Texas. All of the other publishers use either the Lone Star School Book Depository or the Texas School Book Depository, privately owned companies located in Dallas, for the purpose of storing their books. Each publisher is required to keep a sufficient number of books in storage in their respective depositories to meet the demands of the local school dis-

tricts from year to year. Each local district in the State requisitions the Texas Education Agency, Textbook Division, in Austin for the type, title and number of books needed to operate the local schools. Upon approval of such requisitions the Textbook Division directs the publisher's depository to make shipment direct from the depository to the local district. More than 99% of all books purchased outside of the State come to rest and remain in storage in the depositories for periods of weeks, months and sometimes longer. Less than 1% of the books are shipped direct from the publisher to the local school.

The following table indicates by years the number of books purchased, and total cost and the percentage that are shipped direct from the publisher to the local schools:

Year	*Number of Books Purchased*	*Annual Cost*	*Direct Shipments Percentage*
1960-61	6,513,137	$ 8,417,420	.093
1961-62	4,423,435	7,456,128	.208
1962-63	4,741,052	10,145,435	.....
1963-64	4,513,002	9,288,619	.....
1964-65	5,625,236	11,788,452	.087
1965-66	6,368,983	16,062,136	.287

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VIII.

Bexar County Hospital District. If William B. Forster, FACHA, Administrator of Robert B. Green Hospital, were present and placed under oath, he would testify as follows:

A. Organization. The Bexar County Hospital District is a Hospital District organized under the laws of the State of Texas. Its Governing Board is appointed by the Commissioners Court of Bexar County and operates Robert B. Green Memorial Hospital, and its operation is fairly typical of the public hospitals of the State of Texas, except that we feel that because of a large amount of property owned by the United States Government in Bexar County, which is

exempt from taxation, that this would cause lower tax rolls than would be expected and thereby, to some extent, limit the maximum ad valorem yield.

B. Financing. The hospital is financed through the collection of ad valorem taxes plus other small collections, which include Medicare, State Welfare Department aid, and collections from patients where possible. The budget of the hospital is $5,136,054.51 per year and of this amount, 5.9% came from patients. In other words, approximately 94% of the patients pay none of their hospital charges. It is not the policy of the hospital to charge paying patients more than actual cost of their cost of their care to help pay the cost of those who pay nothing. This hospital has 328 beds in the general hospital plus 96 bassinets. The Nursing Home has 250 beds. During the last fiscal year, there were 13,342 admissions, 3,053 were births.

C. Supplies. Medicines and drugs purchased from whatever supplier quotes the best price. Preference is given to local firms whose prices are equal or better than out of county firms. The same holds true for the other supplies, including food served to patients. We always attempt to purchase from the lowest bidder whether from in the county, out of the county or out of the State. We do not keep any record, however, of out of State purchases as distinguished from local purchases, and we, of course, are not concerned with whether goods purchased from local dealers are manufactured outside of the State or not.

D. Employees. The hospital employes 843 persons. Of this number 560 make less than $1.60 per hour as shown by Exhibit No. 20. Employees do not work longer than a 40 hour work week except in very unusual circumstances, which would include when other employees become ill, sometimes in the laundry and sometimes in the operating room when operations run longer than schedule. Without taking overtime into consideration, it will ultimately cost the hospital approximately $493,000 per year to comply with the Minimum Wage provisions of the Act as reflected by Exhibit No. 20. This does not take into consideration any growth factor. The hospital tax levy is now at ap-

proximately the maximum rate that is allowed by law. If the hospital is subject to the Fair Labor Standards Act, it is our opinion that it will be necessary for us to curtail services. The Hospital Board cannot raise county valuations. If county valuations were raised, the tax payers would be paying additional money, not only for the hospital, but also for all other taxing units depending on these assessed values. For this reason, it is very unlikely that there will be a revaluation of all property in the county in order to provide these extra funds for the hospital. It is much more likely that we will be ordered to curtail our services to the poor.

IX.

A. Dr. Abner McCall, President of Baylor University, Waco, Texas, if present and placed under oath would testify to the following:

I am President of Baylor University and have been in the field of education as a college professor and administrator for over 25 years. I have been active in the affairs of church-related schools and colleges and non-public institutions of higher learning in the State of Texas, and am presently serving as president of the association composed of these institutions. I feel that I am thoroughly familiar with the problems and affairs of this type institution. In our opinion, public-supported junior colleges and institutions of higher learning are not in competition with our institutions. At the present time none of the private institutions in Texas have facilities to care for more students, and we are having to increase our standards for admission in order to eliminate a lot of those students who would like to enter our institutions. For us to be able to take more students we would have to find a source of money from foundations or private individuals who would build us more dormitories and classroom facilities. The tuition charged the student takes care of only a small part of the cost of operating the institution. For this reason we encourage students to attend junior colleges if possible, or other public institutions. Should the public institutions

close their door we would not be able to take care of the students now in attendance at these public institutions.

B. If Curtis C. Ramey, President of Forth Worth Christian College, Fort Worth, Texas, were placed on the witness stand and placed under oath, he would testify to the following:

Fort Worth Christian College is an institution of higher learning located in Fort Worth. The college is a private junior college governed by a self-perpetuated Board of Trustees. The only source of revenue for the operation of the college are gifts, income from endowments, tuition from students, and income from dormitory rentals and cafeteria operations. If the tax-supported institutions in the area should for any reason close, and our college found itself with a large number of students desiring entrance, the only way this could be accomplished would be for us to receive gifts for the purpose of constructing additional buildings, facilities and classrooms. We do not have such money available, nor in contemplation. Likewise, we do not have additional space on our campus to build additional buildings. The tuition of our college for students amounts to the sum of $19.50 per semester hour. This is much higher than the tuition of tax-supported institutions in the immediate area. Our college is not in competition with tax-supported state institutions in this area, nor in any other section of the State of Texas. We now have all the students we can comfortably accommodate. In my opinion this is the same situation that exists in connection with all other private junior colleges.

C. James H. Stewart, Jr., Superintendent of Masonic Home Independent School District, Fort Worth, Texas, if placed under oath would testify to the following:

The Masonic Home and School of Texas is located at Fort Worth, Texas. It now has 249 students. The School is operated by the Masonic Home Independent School District, which was created as an Independent School District under the laws of the State of Texas in 1913. It is governed by a Board of Trustees consisting of three members who serve without compensation for indefinite terms. To be

eligible to attend school at Masonic Home Independent School District, the child must reside in the Masonic Home and School of Texas. To secure admission, the applicant must be the child or grandchild of a Master Mason in good standing in a subordinate lodge in Texas, and may be admitted only because the father is deceased, incurably ill, insane, or other similar conditions which would deprive the child of a proper home. Although we are classed as a private school, we do not feel that the Forth Worth Independent School District is in any way in competition with our operation. Since we are very selective in the children that we receive, we would not be in a position to accept students in general from the Fort Worth Independent School District should it cease operation.

D. Mr. Law Sone, President of Texas Wesleyan College, if present and placed under oath, would testify to the following:

I am President of Texas Wesleyan College, an institution of higher learning located in Fort Worth, Texas. The College is related to the Methodist Church, but it operates under the jurisdiction of its own Board of Trustees. I am familiar with the operation of institutions of like character in the State of Texas. The only source of revenue for the operation of the college and institutions of like character are gifts, income from endowments, tuition from students and income from dormitory rentals and cafeteria operations. At the present time, the college has approximately 2200 students which is the total capacity of its facilities. If the tax-supported institutions in the area should for any reason close and we had a large number of applicants from people in the area, the only way that we would be of service would be for us to receive gifts which would enable us to construct additional buildings, facilities and classrooms. We do not have such money available nor in contemplation. Likewise, we do not have adequate space on our campus to build additional buildings. Tuition of our college per student amounts to the sum of $25.00 per semester hour. This tuition cost is much greater than the cost of the tax-supported institutions. We do not feel that the tax-supported institutions in the State of Texas are in any way.

in competition with out institution as we have all the students that we can handle.

X.

It is hereby stipulated that as of February 1, 1967, the provisions of the Fair Labor Standards Act, 29 U.S.C. Sec. 201, et seq., may be applicable to the following agencies and political subdivisions of the State of Texas or a portion of the employees thereof: The Texas Youth Council, The Department of Health, The Texas Department of Mental Health and Mental Retardation, the various Independent School Districts operating public school for elementary and secondary education, the public hospitals operated by political subdivisions of the State of Texas, the Junior Colleges operated by various Junior College Districts and the institutions of higher education operated by the State of Texas subject to the determination of this cause of action and other judicial interpretations of their functions. The Wage and Hour and Public Contracts Divisions of the United States Department of Labor is charged with the enforcement and application of the Fair Labor Standards Act, as amended, and subject to regulations promulgated by the Department of Labor, the orders of this Court and/or courts of competent jurisdiction will apply and enforce the provisions of the Fair Labor Standards Act, as amended, to the above institutions and schools of the State of Texas. These agencies and political subdivisions in the operation of schools, hospitals and other institutions are implementing the duties and responsibilities delegated to them by the statutes and Constitution of the State of Texas (and are engaged in functions which are governmental in nature.) These agencies in the exercise of their function use various quantities of goods and supplies which are produced outside of the State of Texas. These goods and supplies are essential to the furtherance of these agencies and political subdivisions' promotion and administration of the health, safety and welfare of the citizens of Texas and are used and consumed entirely by the agencies and political subdivisions as previously set forth. The nature of the duties and responsibilities of the various agencies and po-

litical subdivisions, the volume and nature of goods and supplies purchased by or for their use, and the manner of purchasing for each appears above.

(Signatures.)

EXHIBIT 5

* * * * * *

ANNUAL REPORT

TUBERCULOSIS CONTROL SERVICES

* * * * * *

A major problem faced by all activities of the Tuberculosis Control Program during the past fiscal year was the recruitment and retention of qualified medical, paramedical, and service personnel. Fierce competition, an abnormal low rate of unemployment, and continued economic growth in the areas surrounding each tuberculosis hospital made certain categories of health personnel extremely difficult, if not impossible, to recruit. During the first quarter of the fiscal year 1965-66 a sharp upward trend was noticed in the turnover rates in the four institutions. The turnover rate continued to rise steadily and reached alarming proportions during the third and fourth quarters. In fact, San Antonio Tuberculosis Hospital reached 9.6 percent turnover in July and 9.1 percent in August, 1966. A turnover rate in excess of 3 percent is considered by most economic and business experts to be critical to efficient operation and stability. By the end of the fiscal year 1965, San Antonio's turnover rate for the year was 53.61 percent; East Texas was 44.06 percent, McKnight 42.80 percent, and Harlingen 31.82 percent, an average personnel turnover in the four hospitals of 43%.

A combination of uncontrollable factors contributed to this extremely high and non-productive turnover rate. State salaries which had been equal to or above average local wages were suddenly found to be well below the beginning salaries paid to workers in industries, private

hospitals, and other business organizations surrounding the hospitals. Despite the salary increase in September, 1965, the middle of the year found 57 percent of the hospital employees earning less than $3,000 per year. Rising costs of living and the aforementioned competition forced not only new applicants to shun employment, but caused a significant number of older employees to seek employment where the monetary rewards were far greater. The increased turnover rates were not confined to the low salary groups. Difficulty has been experienced in recruiting and retaining trained professional employees in such categories as nursing, laboratory, x-ray and physicians. Throughout the year the four tuberculosis hospitals have had an average of 10 to 12 nursing vacancies every month. Twenty-five percent of the Medical Technologist positions remained vacant throughout the year. Registered Therapists and Caseworkers were extremely hard, if not impossible, to recruit due to the low salary structure being offered these classes. The Personnel Officers of the four tuberculosis hospitals and the Central Office Personnel Division intensified recruiting efforts in every possible way, but despite all the efforts expended on recruiting and retention, the number and types of vacancies at the end of the fiscal year were greater than those at the beginning.

* * * * * * *

STIPULATION

Without conceding the relevancy and materiality thereof, the parties hereby stipulate that the statements of facts and figures set forth herein and in the exhibits attached hereto may be accepted by the Court and may be received as evidence in this case.

1. Recognizing that available statistics are not always current and that the time for preparation available to the parties herein has been limited, it is stipulated and agreed that the facts and figures referred to above and included in or attached to the separate stipulations dealing respectively with the States of Maryland, Texas and Ohio may be treated as representative and typical as to all the plaintiff States (including the political subdivisions thereof)

and for all times material hereto. It is recognized and agreed that said facts and figures as supplied by the States do not include all types of materials, supplies and equipment used in the operation of schools and hospitals within said States.

2. It is further agreed and stipulated that plaintiffs herein do not accept or agree to or consent that they or the Court shall be bound by any inferences, opinions and conclusions herein expressed or by any statements of ultimate fact which are not supported by basic facts.

3. Defendants' exhibits are as follows:

Exhibit A: Material prepared by the Wage and Hour and Public Contracts Divisions' Division of Research and Legislative Analysis from authoritative source material such as technical publications and official reports of various Government Agencies and Bureaus, as follows:

1. Material pertaining to Maryland schools (attachments A through K) and hospitals (attachments A, B, C and E).

2. Material pertaining to Texas schools (attachments A through K) and hospitals (attachments A, B, C and E).

3. Material pertaining to Ohio schools (attachments A through K) and hospitals (attachments A, B, C and E).

4. Material pertaining to schools (attachments A through H) and hospitals (attachments A, B, C and E) throughout the United States.

Exhibit B: Statements and/or affidavits by officials of various Government Agencies and Bureaus and official publications, as follows:

1. Programs Administered by the U.S. Office of Education, Fiscal Year 1967.

2. Programs and Services, U.S. Department of Health, Education and Welfare (February, 1966).

3. Grants-in-Aid and Other Financial Assistance Programs, U.S. Department of Health, Education and Welfare (1966 Edition).

4. Tenth Annual Report on Health Research Facilities by the Surgeon General of the Public Health Service, House Document No. 496 (89th Congress, 2d Session, September, 1966).

5. Senate Report No. 146 (89th Congress, 1st Session, April, 1965).

6. Subcommittee Print prepared for the Special Subcommittee on Education, Vol. II (U.S. Government Printing Office, March, 1966).

7. Subcommittee Print prepared for the Special Subcommittee on Education, Vol. I (U.S. Government Printing Office, March, 1966).

8. Letter from Director of School Lunch Division, U.S. Department of Agriculture to Solicitor of Labor, U.S. Department of Labor, Dated February 23, 1967. Chart and pamphlet.

9. Report of Subcommittee on Employment and Manpower, Committee on Labor and Public Welfare, U.S. Senate (88th Congress, 2d Session, 1964).

10. Stipulation-statement of Mr. Charles M. Zellers, U.S. Office of Education.

11. Stipulation-statement of Mrs. Agnes W. Brewster, U.S. Public Health Service.

Exhibit C: Sample statements and catalogues from a number of firms which sell and distribute school and hospital supplies, as follows:

1. Will Ross, Inc.: Letter dated 2/13/67
   Letter dated 2/15/67
   Letter dated 2/22/67
   and catalogue
2. W. A. Kyle Company: Letter dated 2/17/67
3. W. S. White Company: Letter dated 2/17/67

4. Leicy's Incorporated: Letter dated 2/13/67
5. E. A. McClure Company: Letter dated 2/13/67
6. Stanley Supply Company, Inc.: Letter dated 2/13/67
7. Southern Precision Instrument Co.: Letter dated 2/9/67; partial list of SPI Microscope Users; catalogues
8. Lycett, Inc.: Letter dated 2/2/67 and catalogue

4. It is further agreed and stipulated that each of the plaintiff States (including the political subdivisions thereof) employs in its schools and hospitals in carrying out the functions thereof persons who are variously engaged in ordering, purchasing or otherwise procuring directly or indirectly from sources outside the State certain quantities of a large variety of materials, supplies and equipment for use in said schools and hospitals, and/or in receiving, handling, distributing, dispensing or otherwise working on, paying for and keeping books concerning said items. Certain persons employed by each of plaintiff States (including the political subdivisions thereof) in most schools and hospitals are also variously engaged in corresponding and otherwise communicating with students, prospective students, professors, nurses, doctors and other school and hospital personnel in other States and with organizations or associations thereof, and with representatives of the United States Government in Washington, D. C., and elsewhere, and in the preparation of certain items which are being transmitted from one State to places in other States.

(Signatures of Counsel.)

DEFENDANTS' EXHIBIT A-1

MARYLAND SCHOOLS

General

More than two-thirds of the elementary and secondary schools in Maryland are public schools. They account for more than four-fifths of the total enrollment (Attachment A).

The 27,000 classroom teachers in 1963-64 made up the great majority of personnel employed by the public elementary and secondary school system. The next largest group of employees — somewhat over 6,000 — was concerned with plant operation and maintenance (Attachment B). In the fall of 1966, public schools accounted for 85 percent of all classroom teachers (Attachment C).

Public institutions of higher education are less than half of the total of such institutions, but account for two-thirds of the enrollment (Attachment D).

Expenditures and Receipts

In 1963-64 total current expenditures in elementary and secondary schools were $310 million, capital outlay was $87 million, and interest on school debt was $17 million. By 1966-67 these figures had increased by 42 percent, 14 percent, and 38 percent, respectively. Expenditures for instruction comprised more than two-thirds of total expenditures (Attachment E).

Expenditures for school equipment and supplies, excluding capital outlay and payments for fuel, power and light, were about $14 million in the 1961-62 school year. Expenses connected with instruction and textbooks comprised almost two-thirds of the total (Attachment F).

Of 1,046 suppliers of major items of school equipment listed in *P/I, Product Information for Schools,* February-March 1965, only 4 are located in Maryland. Of more than 500 suppliers of other items of school equipment, another 4 are in Maryland (Attachment G). Only three of these 8 firms have assets of over $1 million, and these are in very general product categories, not specifically related to school supplies and equipment (Attachment H).

Maryland elementary and secondary public schools derived 6 percent — $22 million of their total revenue receipts (appropriations, taxes, endowments and the like) from the Federal government in 1963-64 (Attachment I). A total of more than $67 million in Federal funds was channeled into Maryland for education and related activities at all levels

of instruction in fiscal year 1965, including $9 million for health related training and $7 million for school lunch and milk, in addition to the $23 million for elementary and secondary school education and $16 million for higher education (Attachment J).

In the fall of 1963, more than 13,000 students from outside of Maryland were studying at Maryland colleges (Attachment K).

Maryland Hospitals

General

Of a total of 86 hospitals in Maryland, 19 are State and local government hospitals. These account for more than half of the beds in all hospitals, but less than 15 percent of the total admissions (Attachment A).

State and local hospitals also have about 30 percent of the full-time personnel in all hospitals. The average annual wage for these personnel was $4,253 in 1965, considerably less than the $6,406 average in Federal hospitals. These figures exclude residents, interns, and students, however, and the Federal hospitals may show a higher wage because of the inclusion of staff physicians (Attachment B).

Expenditures and Receipts

Thirty-two suppliers of hospital supplies and equipment were listed for Maryland in the *Hospital Purchasing File*, 1963 edition. These represent about 1 percent of all the suppliers listed. Only three of these with main offices in Maryland have total assets of over $1 million. Two others have assets of over $300,000 (Attachment C).

The three largest firms produce and supply business forms, cold storage doors, and pharmaceuticals. The next two largest firms produce and supply animal laboratory apparatus and printed materials. It seems reasonable to conclude that a significant proportion of the supplies and equipment necessary to the operation of hospitals in Maryland are produced, supplied, or both, by out-of-state firms.

Federal aid payments by the Public Health Service to individuals and private institutions in Maryland totaled almost $25 million in fiscal year 1965. Allocations or grants by the Public Health Service to State agencies and local units in Maryland totaled more than $5 million in fiscal year 1966. About two-thirds went for hospitals and medical facilities (Attachment E).

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MARYLAND HOSPITALS

Attachment B

Expenditures and average annual wage of full-time personnel, by type of hospital, 1965

Classification	Number of hospitals	Total expenditures (000)	Payroll expenditures (000)	Number of full-time personnel 1/	Average annual wage 2/
All Maryland hospitals	86	$270,381	$184,856	41,715	$4,431
Federal hospitals	12	51,850	41,698	[redacted]	[redacted]
Nonfederal hospitals	74	218,531	143,158	35,206	4,066
State and local government	19	71,800 3/	52,847	12,425	4,253
Short term	5	27,115	18,758	4,660	4,025
Psychiatric and mental retardation	8	33,336	25,369	5,822	4,357
Tuberculosis	3	6,550 3/	4,828	1,018	4,743
Other long term	3	4,816	3,892	925	4,208
Nongovernment	55	146,700 3/	90,311	22,781	3,964

1/ Includes full-time personnel plus full-time equivalents of part-time personnel. Excludes residents, interns, and students.
2/ Average annual wage calculated from number of full-time personnel and payroll expenditures.
3/ Approximate figures.

Source: Hospitals, Journal of the American Hospital Association, August 1966.

DEFENDANTS' EXHIBIT A-2

TEXAS SCHOOLS

General

Ninety percent of the elementary and secondary schools in Texas are public schools. They account for more than 94 percent of the total enrollment (Attachment A).

The 95,000 classroom teachers in 1963-64 made up the great majority of personnel employed by the public elementary and secondary school system. The next largest group of employees — about 18,000 full and part-time workers was food service personnel, followed by plant operation and maintenance personnel, about 15,000 (Attachment B). Classroom teachers in public schools were 94 percent of the total in the fall of 1966 (Attachment C).

Public institutions of higher education are a little more than half of the total of such institutions, but account for more than three-fourths of the enrollment (Attachment D).

Expenditures and Receipts

In 1963-64, total current expenditures in public elementary and secondary schools were $844 million, capital outlay was $165 million, and interest on school debt was $43 million. By 1966-67 these figures had increased by 22 percent, 3 percent, and 12 percent, respectively. Expenditures for instruction comprised well over half of total expenditures (Attachment E).

Expenditures for school equipment and supplies, excluding capital outlay and payments for fuel, power and light, were about $44.5 million in the 1961-62 school year. Expenses connected with instruction and textbooks comprised over one-half of the total (Attachment F).

Of 1,046 suppliers of major items of school equipment listed in *P/I Product Information for Schools*, February-March 1965, only 25 are located in Texas. Of more than 500 suppliers of other items of school equipment, another 12 are in Texas (Attachment G). Seven of those Texas

firms have assets of over $1 million, and only three of these deal primarily with school equipment. (Attachment H).

Texas elementary and secondary public schools derived 4.6 percent — $50 million of their total revenue receipts (appropriations, taxes, endowments and the like) from the Federal government in 1963-64 (Attachment I). A total of almost $131 million in Federal funds was channeled into Texas for education and related activities at all levels of instruction in fiscal year 1965, including $23 million for school lunch and milk and $13 million for vocational-technical training (Attachment J).

In the fall of 1963, more than 22,000 students from outside of Texas were studying at Texas colleges both public and private. This was more than 5,000 more than the number who left Texas to study in another State (Attachment K).

Texas Hospitals

General

Of a total of 556 hospitals in Texas, 144 are State and local government hospitals. These account for almost half of the beds in all hospitals, and about one-fourth of the admissions (Attachment A).

State and local hospitals also have about 30 percent of the full-time personnel in all hospitals. The average annual wage for these personnel was $3,418, about $500 less than the average for all hospitals (Attachment B).

Expenditures

Forty-six suppliers of hospital supplies and equipment were listed for Texas in the *Hospital Purchasing File*, 1963 edition. These represent about 2 percent of all the suppliers listed. Ten of these have assets of over $1 million, and most of these ten are involved specifically in the production or supply of both, of hospital equipment and supplies. (Attachment C).

Allocations or grants by the Public Health Service to State agencies and local units in Texas totalled almost $24

million in fiscal year 1966. More than two-thirds went for hospitals and medical facilities (Attachment E).

DEFENDANTS' EXHIBIT A-3

OHIO SCHOOLS

General

More than four-fifths of the elementary and secondary schools in Ohio are public schools and they account for a like proportion of pupils (Attachment A).

The 78,000 classroom teachers in 1963-64 made up the great majority of personnel employed by the public elementary and secondary school system. The next largest group of employees was made up of plant operation and maintenance personnel, about 14,000. Full-time and part-time food service personnel accounted for another 11,500, and there were 6,000 secretarial and clerical personnel (Attachment B). Classroom teachers in public schools were 88 percent of the total in the fall of 1966 (Attachment C).

Public institutions of higher education are only 16 percent of the total of such institutions, but account for almost two-thirds of the enrollment (Attachment D).

Expenditures and Receipts

In 1963-64 total current expenditures in public elementary and secondary schools were $954 million, capital outlay was $159 million, and interest on school debt was $36 million. By 1966-67 these figures had increased by 7 percent, 17 percent, and 37 percent, respectively. Expenditures for instruction comprised well over half of total expenditures (Attachment E).

Expenditures for school equipment and supplies, excluding capital outlay and payments for fuel, power and light, were about $42.7 million in 1961-62 and $59.5 million in 1963-64. Expenses connected with instruction and textbooks comprised over one-half of the total in the latter year (Attachment F).

Of 1,046 suppliers of major items of school equipment listed in *P/I, Product Information for Schools,* February-March 1965, 86 are located in Ohio. Of more than 500 suppliers of other items of school equipment, another 44 are in Ohio (Attachment G). There are certain categories of products, such as book publishers and distributors, which have only a small number of firms or no firms located in Ohio. About half of these Ohio firms are large in size, having assets of over $1 million. (Attachment H).

Ohio elementary and secondary public schools derived 3 percent — $27 million of their total revenue receipt (appropriations, taxes, endowments and the like) from the Federal government in 1963-64 (Attachment I). A total of $126 million in Federal funds was channeled into Ohio for education and related activities at all levels of instruction in fiscal year 1965, including $25 million for school lunch and milk and $17 million for vocational-technical training (Attachment J).

In the fall of 1963, more than 42,000 students from outside of Ohio were studying at Ohio colleges. This was more than 8,000 more than the number who left Ohio to study in another State (Attachment K).

Ohio Hospitals

General

Of a total of 256 hospitals in Ohio, 76 are State and local government hospitals. These account for almost half of the beds in all hospitals, and about 15 percent of the admissions (Attachment A).

State and local hospitals also have about one-fourth of the full-time personnel in all hospitals. The average annual wage for these personnel was about $4,200 in 1965 (Attachment B).

Expenditures and Receipts

Almost 250 suppliers of hospital supplies and equipment were listed for Ohio in the *Hospital Purchasing File,* 1963

edition. These represent less than 10 percent of all the suppliers listed. There are certain categories of products, such as pharmaceuticals and laboratory equipment, which are made or supplied by only a small number of firms located in Ohio. (Attachment C).

Almost $18 million was allocated or granted by the Public Health Service to State agencies and local units in Ohio in fiscal year 1966 for such projects as hospitals and medical facilities ($12 million) and construction of community mental health centers ($2.5 million).

DEFENDANTS' EXHIBIT A-4
(Attachment B)

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HOSPITALS, UNITED STATES

Attachment B

Expenditures and average annual wage of full-time personnel, by type of hospital, 1965

Classification	Number of hospitals	Total expenditures (millions)	Payroll expenditures (millions)	Number of full-time personnel 1/ (000)	Average annual wage 2/
All hospitals in U.S.	7,123	$12,948.1	$8,551.4	1,952.4	$4,380
Federal hospitals	443	1,567.6	1,264.1	[redacted]	[redacted]
State and local government	2,041	3,922.5	2,744.8	626.5	4,381
State	546	1,969.0	1,458.2	330.9	4,407
County	854	958.9	631.9	154.6	4,087
City	339	671.9	455.1	88.6	5,137
City-county	77	111.0	72.7	18.1	4,017
Hospital district	225	211.7	126.9	34.3	3,700
Nongovernment	4,639	7,458.0	4,542.5	1,127.4	4,029
Voluntary non-profit	3,670	6,888.6	4,247.2	1,050.2	4,044
Proprietary	969	569.4	295.3	77.2	3,825

1/ Includes full-time personnel plus full-time equivalents of part-time personnel. Excludes residents, interns, and students.

2/ Average annual wage calculated from number of full-time personnel and payroll expenditures.

Source: Hospitals, Journal of the American Hospital Association, August 1966.

DEFENDANTS' EXHIBIT C

* * * * * *

W. A. Kyle Company

115 Hyde Park Blvd,
Houston, Texas 77006

February 17, 1967

Via Air Mail

Mr. James M. Miller
Deputy Associate Solicitor,
U. S. Department of Labor
Room 4135
14th and Constitution Avenue, N.W.
Washington, D. C. 20210

Re: *State of Maryland, et al. v. Wirtz, et al.*

USDC D. Md. — Civil No. 18005

Gentlemen:

Please refer to your form letter dated February 7 with reference to the captioned subject. We are answering your questions from your letter to the best of our ability with the same reference numbers but wish to assure you that statistical information which we maintain does not give the complete answers:

(1) We do not have a catalog available. We supply hospitals with capital equipment such as bedroom furniture, operating room furnishings, nurses station equipment, and miscellaneous equipment for the hospital other than certain house keeping and X-ray equipment.

(2) We estimate our sales to city, county, and state institutions within the State of Texas to amount to possibly $75,000.00 per year.

(3) We estimate total purchases by us outside of the State of Texas to represent a dollar volume of $1,700,000.00.

(4a) We estimate an inventory turn over of approximately 6 and ½ times per year over all. We estimate that out of a total yearly volume of 2 and ½ million dollars that approximately ½ million dollars is ordered out after obtaining orders from customers to cover items which we normally do not stock. Generally these items (ordered out) are capital equipment.

(4b) We estimate approximately $150,000.00 annually of (4a) represents drop shipments and usually involves only capital equipment.

Trusting that this information proves helpful, we remain

Very truly yours,

W. A. KYLE CO. — HOUSTON
W. J. MARONEY

WJM/ma

W. S. White Co.
2015 Ninth Street
Wichita Falls, Texas

February 17, 1967

Mr. James M. Miller
Deputy Associate Solicitor
U. S. Department of Labor, Room 4135
14th and Constitution Avenue, N.W.
Washington, D. C. 20210

Dear Mr. Miller:

Due to my absence from the office, your letter of February 7th, relative to the *State of Maryland, et al. v. Wirtz, et al.* USDC D .Md. — Civil No. 18005, has only now been brought to my attention. We shall do our best to provide the information you request; however, our bookkeeping system does not lend itsself to the exact breakdown of sales figures you seek. Therefore, we will do our best to approximate our answers as accurately as possible.

Question No. One. We supply all types of equipment, i.e., operating tables, delivery tables, examining tables, hospital beds, anethesia machines, pumps, sterilizing equipment, instruments etc. for use in hospitals, as well as expendable, or supply, items such as bandages, dressings, I.V. solutions, syringes and needles, liquid sterilizing agents, rubber gloves, catheters, Kleenex etc. We have issued a catalog in the past, and many are still in the possession of our customers, but we have not issued one since 1964, and our supply at this time is completely exhausted. Thus, we do not have a copy to enclose herewith.

Question No. Two. Our total dollar volume of sales to state, county or municipal hospitals, within the State of Texas, for the calendar year 1966, was approximately $300,000.00.

Question No. Three. It is estimated that $240,000.00 worth of these goods are manufactured outside of the State of Texas. However, a number of manufacturers warehouse within the state, and we order from these warehouses where possible, although the goods are actually manufactured elsewhere. About $40,000.00 worth of the $240,000.00 total are thus secured from warehouse facilities within the state.

Question No. Four. Part (A) We attempt to supply all expendable items, and emergency equipment items, from our stock. Between 70% and 75% of our orders are thus filled directly from our warehouse, 10%-15% are drop shipped, and the balance is shipped from our stock room after receipt of same from the manufacturer, either as a back order, or as a special order.

Question No. Four. Part (B) Approximately 10% of our orders are drop shipped, and we estimate that 90% of our drop shipments are from manufacturers outside the State of Texas. Drop shipments consist mainly of major equipment items, items fabricated especially for a particular job etc., or non-stable products with short expiration dates such as sheep cells, blood fractions etc.

Included in this category is also bulk shipments of large orders of bandages, dressings, paper products etc.

Although we have answered mostly in approximations and estimates, we believe our answers to be very close to accurate, and trust that we have provided the desired information herein.

Sincerely,

W. S. WHITE Co.
W. S. WHITE

Leicy's
Incorporated

1531-1533 W, Market St.
Steubenville, Ohio

February 13, 1967

Mr. James M. Miller
Deputy Associate Solicitor, U. S.
Department of Labor Room 4135
14th * Constitution Avenue, N.W.
Washington, D. C. 20210

Gentlemen;

In reply to your letter of February 9th, requesting, information regarding our operation, please be advised as follows;

1. Merchandise sold to hospitals, includes, Surgical Dressings, Gloves, Syringes and needles, equipment and medications.
2. Our total volume of sales for 1966 was approximately $750,000.00. We figure at a percentage of sales to hospitals at 60% of the figure.
3. 75% of these good would be obtained outside of the state.

4. (a.) We attempt to stock all items used by our hospital accounts and only make drop shipments in emergencies.

(b.) Drop shipments only if we are out of stock and a drop shipment will save time.

Very truly yours,

J. E. PADDACK

LEICY'S INC.

PHYSICIAN AND HOSPITAL SUPPLIES

E. H. McClure Company

February 13, 1967

Mr. James M. Miller
Deputy Associate Solicitor, U.S. Department of Labor, Room 4135
14th and Constitution Avenue, N.W.
Washington, D.C. 20210

Dear Sir:

Re: State of Maryland, et al. v. Wirtz, et al.
USDC D. Md. — Civil No. 18005

We have your letter of February 7th, and will give you as nearly as possible an answer to the points requested.

1. This year we received the State Award covering the following categories:

a. Minnesota Mining and Manufacturing Company products, including Micropore Tape, Blenderm Tape, Skin Closures, Steri-strips, Surgical Drapes, Autoclaive Indicator Tape, etc.

b. Bard Parker Company Knife Blades, Handles and Antiseptic Solutions.

c. Becton, Dickinson Company Blood Lancets.

d. Anchor Products Company—Surgeons Needles.

e. Becton, Dickinson Company — Universal Interchangeable Glass Syringes, including Insulin and Tuberculin Glass Syringes.

f. Becton, Dickinson Company—Stopcocks, Adapters.

g. Becton, Dickinson Company—Vacutainers.

This contract began on December 1, 1966 and will last for twelve months.

For the previous twelve months' period, we received the State Annual Contract on:

a. Fleets Disposable Enemas.

b. Ames Company and Hyland Laboratories Plasma Diagnostic Reagents.

c. Duke Laboratories, Elastoplast.

d. Minnesota Mining & Manufacturing Company—Microport Tape.

e. C. R. Bard Company, Rubber and Plastic Catheters, including Foley type self-retention.

f. Becton, Dickinson and Company Universal Interchangeable Glass Syringes.

g. Becton, Dickinson and Company, Yale and Super-Ward Needles.

h. Becton, Dickinson and Company Stopcocks and Adapters.

i. Bard Parker Company, Knife Blades, Handles and Antiseptic Solutions.

2. Our approximate total volume of sales to State of Texas Institutions, Dallas County Hospital District, Dallas County Health Department, City of Dallas, City of Dallas Public Schools, Dallas Junior College, and one Federal Institution, the William Beaumont General Hospital of El Paso, is $201,600.00.

This is for a period of seven months, beginning July 1, 1966 through January 31, 1967.

All of these customers are within the State of Texas.

3. The manufacturers described in Item 1 are located outside the State of Texas, and therefore, our answer would be that all of the $201,600.00 merchandise was obtained from manufacturers located outside the State of Texas.

4. Our business is obtained in the general hospital supply field through our salesmen, of whom we have thirteen. Business done, however, with the institutions listed in Item 2, was obtained by formal bids.

4(A) We carry in stock a very large inventory, on which we figure a turnover of approximately seven times a year. Hence, in submitting bids, and making sales through our salesmen, we generally state, "Delivery in 1 to 10 or 12 days", meaning that we normally can fill either all, or at least a part of the order from our stock, the balance to follow by replenishment to our stock.

4(B) We would say that normally 75% of our business is shipped from our stock, the remaining 25% being drop-shipped direct from the manufacturer.

The above refers to any and all supplies and equipment normally used by hospitals, with the exception of X-ray and Major Laboratory Apparatus.

We sincerely trust the above information will be of help.

Yours very truly,

E. H. McCLURE COMPANY,
J. C. RUTLEDGE,
General Consultant.

JCR:r

STANLEY SUPPLY CO. INC.
2121 Butler St.
Dallas, Texas 75235

February 13, 1967

Mr. James M. Miller
Deputy Associate Solicitor
U.S. Dept. of Labor, Room 4135
14th and Constitution Avenue, N.W.
Washington, D.C. 20210

Dear Mr. Miller:

This is in reply to your form inquiry of February 7 re State of Maryland, et al-v-Wirtz, et al.

1. We are a distributor for approximately 700 manufacturers, handling about 32,000 items for sale to doctors and hospitals. We do not have our own catalogue. Our sales force is equipped with manufacturer's catalogues, which have far more detailed specifications than any dealer can afford to have in its own catalogue. We are prepared to supply material to all departments of a hospital except for X-Ray, Pharmacy, maintenance, linen room, laundry and dietary. We supply such diverse items as operating room tables, carpeting, cardiac monitoring equipment and rub lotion.

2. It is virtually impossible to reconstruct our sales to governmental facilities; only as a guesstimate, 65% of our volume is secured from such types of institutions, which, in dollar volume, is approximately $1,600,000 per annum. We operate only within the State of Texas.

3. Virtually 100% of the purchases representing the above volume of sales is secured from outside the State of Texas.

4. A. Approximately 83% of the above volume of sales is shipped from our 3 warehouses in Texas. We

anticipate the requirements of our customers, and due to the critical type of merchandise we supply, service to the customer is of paramount importance. The general exception, representing the other 17% of the total is outlined below.

B. We drop ship approximately 17% of the above volume. This volume is represented by equipment such as patient room furniture, operating room tables, and doctors examining room furniture.

We trust this is the information you require. Please feel free to write should additional facts be necessary.

Sincerely,

STANLEY SUPPLY CO., INC.,
S. JAY STANLEY,
President.

LYCETT, INC.

February 8, 1967

Mr. James M. Miller
Deputy Associate Solicitor
U. S. Department of Labor
Room 4135
14th and Constitution Ave., N.W.
Washington, D. C. 20210

Dear Mr. Miller:

Re: State of Maryland, et al. v. Wirtz, et al.

In response to your inquiry of February 7, we will list approximate answers in the same order as your questions.

1. We are enclosing herewith our school supply catalog. Our lines of merchandise generally fall under the category of teaching aids or activities materials. Most of our merchandise is used at the kindergarten and elementary school level.

2. We would estimate our total volume to public jurisdictions in Maryland to be about $75,000. Many teachers maintain their own accounts with us for which they may or many not be reimbursed by the schools. We could not estimate this type of volume.

3. 99% of our merchandise is manufactured outside of Maryland, and possibly 90% of it is bought and delivered from out of State sources. The remainder would be merchandise which we buy from local jobbers.

4A. Generally speaking, we maintain a substantial inventory to service our customers.

Our rate of turn would be about four, the average for a normal stationery department in a department store. Most of our merchandise is sold "across the counter" but occasionally, where large volume is concerned, we will order from our sources after receiving a firm order from the public jurisdiction.

4B. We do very little drop shipping; possibly six or a dozen instances per year.

Very truly yours,

LYCETT, INC.,
I. C. LYCETT, JR.,
General Manager.